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IN THE

Supreme Court of the United States

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October Term, 1970

No. 541

ARTURO FORNARIS, JR.,
Appellant,

v.

THE RIDGE TOOL CO., *et al.*,
and
THE COMMONWEALTH OF PUERTO RICO,
Appellees.

On Appeal from the United States Court of Appeals
for the First Circuit

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

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The appellant, Arturo Fornaris, Jr., appeals from the judgment entered on March 17, 1970, in this proceeding by the United States Court of Appeals for the First Circuit, pursuant to 28 U.S.C. § 1254(2).

OPINION BELOW

The opinion of the First Circuit, rendered on March 17, 1970, is reported at 423 F.2d 563 and is reprinted in the Appendix hereto, p. 31, *infra*.

The United States District Court for the District of Puerto Rico on August 11, 1969, entered a Memorandum and Order denying a motion to dismiss on constitutional grounds and certifying that the order involved a controlling question of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the order might materially advance the ultimate termination of the litigation. That order, which is unreported, is reprinted in the Appendix hereto, p. 45, *infra*, including an opinion by the Superior Court of Puerto Rico, San Juan Part, in *Construction Machinery & Supplies Corp. v. Construction Machinery Co.*, that was attached to that order.

JURISDICTION

The judgment of the Court of Appeals, acting on an interlocutory appeal allowed pursuant to 28 U.S.C. §1292(b), was entered on March 17, 1970. The appellant duly filed in the Court of Appeals on May 4, 1970, a notice of appeal that is reproduced in the Appendix hereto, p. 44, *infra*. On June 3, 1970, Mr. Justice Brennan signed an order extending the time for docketing this appeal to and including August 14, 1970.

The appeal jurisdiction of this Court is invoked under 28 U.S.C. §1254(2); should the Court determine that the appeal has been improvidently taken, appellant requests that this jurisdictional statement be treated as a petition for certiorari, as 28 U.S.C. §2103 requires, and that this Court's certiorari jurisdiction under 28 U.S.C. §1254(1) be invoked. The jurisdictional problem as to the appeal is treated more fully herein under the heading "The Question of Jurisdiction," p. 10, *infra*.

QUESTIONS INVOLVED

1. Whether the Contract Clause of the United States Constitution, Article I, Section 10, or the so-called retrospective aspects thereof, is incorporated by reference into the Due Process Clause either of the Fifth Amendment or of the Fourteenth Amendment.

2. Whether the Puerto Rican Dealer's Act, 10 L.P.R.A. §278 et seq., as construed to give a damage action for a termination without just cause of a franchise agreement permitting termination at will, violates the Contract Clause of the United States Constitution or the Due Process Clause either of the Fifth Amendment or of the Fourteenth Amendment.

3. Whether a federal court should abstain from adjudicating the validity of a Puerto Rican statute in light of the United States Constitution where (a) there has been no authoritative interpretation or evaluation of the statute by the Supreme Court of Puerto Rico, and (b) the factual development in the particular case before the court is insufficient to permit a determination of precisely what portions of the statute are applicable and precisely what constitutional rules should be applied to the facts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

> Article I, Section 10: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."
>
> Amendment V: ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV, Section 1: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Puerto Rican Dealers' Contract Law, 10 L.P.R.A. § 278, et seq.:

This statute is reprinted in the Appendix hereto, p. 62, *infra*, in its amended form; the changes from the original form are indicated in the statements following each section. The decision below tested the statute in its original form, but the changes effected in 1966 are not material to the decision.

STATEMENT OF THE CASE

Arturo Fornaris, Jr., the appellant herein, initiated this proceeding on September 23, 1966, by filing a complaint in the Superior Court of Puerto Rico, San Juan Part, seeking the recovery of damages in the amount of $175,000, plus attorneys' fees, from the appellee Ridge Tool Company. Fornaris, a citizen of Puerto Rico, alleged that for more than 29 years he had been the exclusive distributor in Puerto Rico of merchandise manufactured by the Ridge Tool Company, which is an Ohio corporation.[1] The distributorship contract was cancelled or terminated, effective April 15, 1966, by the Ridge Tool Company.

The complaint alleged that such termination was "without just cause" and that the "manifest purpose" was to permit the Ridge Tool Company to sell its merchandise in Puerto Rico "taking advantage of the market that the plaintiff [Fornaris] has created in the

[1] Also named as a defendant was the Ridge Tool International Co., Inc., a subsidiary of the Ridge Tool Company in charge of foreign sales and the export market. The Ridge Tool International Co., Inc., is also an appellee before this Court.

country through years of effort and perseverance and depriving him of the just and due compensation to which he has a right under the law, and to procure for himself large economic benefits." It was further asserted that the Ridge Tool Company had "acted jashly and with obvious and manifest scorn of the law of Puerto Rico" inasmuch as the appellant had warned the company that the termination was "illegal in Puerto Rico" and "gives right to indemnification for the damages caused."

In October of 1966 the Ridge Tool Company caused the case to be removed to the United States District Court for the District of Puerto Rico, invoking the diversity jurisdiction of that court. The company thereupon filed a motion to dismiss the action. The motion asserted that Fornaris' claim "is based upon, and is made in reliance upon the provisions of Law Number 75, of June 24, 1964, as amended, (10 LPRA 278 et seq.), hereinafter referred to as the 'Dealer's Act'." The motion then alleged that the Dealer's Act is "void and unconstitutional"

> "... because it is an arbitrary exercise of the police power of the Commonwealth of Puerto Rico; because it cannot be applied to existing contracts ...; because it violates due process of law in that it sets up vague, indefinite and uncertain standards so that men of common intelligence must guess as to its meaning; because it violates equal protection of the laws since it is class legislation protecting existing dealers only, and denies to newcomers the opportunity to contract or attempt to contract with manufacturers in Puerto Rico; because it denies freedom of contract; because it forces violations of Federal and local anti-trust legislation; because it imposes burdens upon manufacturers who are using distributors in Puerto Rico on the date of the adoption of the law and its various amendments not imposed on

other manufacturers who distribute directly in Puerto Rico through their own employees; and because the law contains no requirement that the parties act in good faith with the consuming public."

The Commonwealth of Puerto Rico was allowed to intervene in the case solely to defend the constitutionality of the Puerto Rican statute at stake, the Dealer's Act. Thereafter, in March of 1968, the District Court entered an order staying further proceedings until determination of an appeal then pending before the First Circuit, *United Medical Equipment Corp. v. S. Blickman, Inc.*, No. 6876, wherein the constitutionality of the Dealer's Act was being challenged on the same grounds as those raised herein by the Ridge tool Company's motion to dismiss.[2] But that appeal was mooted by settlement of the case after oral argument but before completion of the First Circuit's opinion.

Similar constitutional claims respecting the Puerto Rican statute were involved in an effort to secure an interlocutory appeal by the First Circuit in *Carmac Chemical Corp. v. Application Engineering Corp.*, No. 7177. The First Circuit had deferred consideration of the application for leave to appeal pending receipt of the views and decision of at least the Superior Court of Puerto Rico with respect to the constitutionality of the Puerto Rican Dealer's Act. But the *Carmac* case, like the *United Medical Equipment* case, was settled before any decision by the First Circuit could be rendered.

In December of 1968 the Superior Court of Puerto Rico determined that the Puerto Rican Dealer's Act

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[2] The District Court for the District of Puerto Rico had ruled that, while the 1966 amendment to the Dealer's Act was prospective only, there was no merit to the allegation that the Act is an arbitrary exercise of the police power of the Commonwealth of Puerto Rico. *United Medical Equipment Corp. v. S. Blickman, Inc.*, 260 F. Supp. 912, 913 (D.P.R. 1966).

violated neither the United States Constitution nor the Puerto Rican Constitution. *Construction Machinery & Supplies Corp. v. Construction Machinery Co.*, Civil No. 67-3549. As respects the United States Constitution, the court held that the Act did not contravene the Contract Clause, the Due Process Clause or the Equal Protection Clause. A translation of that court's opinion was attached to the Memorandum and Order of the District Court in the instant case and appears in the Appendix hereto, p. 45, *infra*. This opinion of the San Juan Section of the Superior Court, however, is not considered under Puerto Rican law to be authoritative or binding on other courts.

As a result of these two abortive appeals, the District Court herein ordered a hearing on the motion to dismiss. At this juncture, no answer had been filed and no evidence taken or facts conceded with respect to the allegations of the complaint. The possible non-constitutional defenses were unknown. Following that hearing the court on August 11, 1969, entered its Memorandum and Order denying the motion to dismiss on constitutional grounds. See Appendix hereto, p. 45, *infra*. The court based its denial on its "prior decision in this area," *Ruiz v. Economics Laboratory, Inc.*, 274 F. Supp. 14 (D.P.R. 1967),[3] and on the recently rendered decision of the Puerto Rican Superior Court in *Construction Machinery & Supplies Corp. v. Construction Machinery Co.*, a copy of which was attached to the order. The court also included in its order a statement, in conformity with 28 U.S.C. §1292(b), that the order dismissing the constitutional defense of the Ridge Tool Company "involves a controlling question of law as to which there is substantial

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[3] An effort to secure an interlocutory appeal of the order in the *Ruiz* case was unsuccessful; the First Circuit denied the petition for permission to appeal the interlocutory order because of the then pendency of the appeal in the *United Medical Equipment* case, which was later settled and withdrawn.

ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

In petitioning the First Circuit for permission to appeal from the District Court's interlocutory order, the Ridge Tool Company stated that the controlling question of law sought to be presented "is whether Act No. 75 of 1964, as amended, the sole basis for plaintiff's claim, (*Francisco Garraton v. Kimberly Clark Corp.*, 267 F. Supp. 909 (D.C.P.R. 1967) is valid and enforceable." And it was further stated that among the challenges to the constitutionality of the statute was the claim that the Dealer's Act "denies to defendant and other manufacturers and/or grantors Due Process of Law as guaranteed by the Constitution of the United States in that it is vague, unreasonable, arbitrary or capricious." References were also made to the claims that the Act was "class legislation violative of the Equal Protection Clause" and that the Act "may not be applied to affect contracts executed prior to June 24, 1964."

The First Circuit allowed this petition to permit an interlocutory appeal. But it ordered that the appeal be treated as submitted without oral argument, which had not been requested, "in view of the extensive argument that was heard in *United Medical Equipment Corp. v. S. Blickman, Inc.*, No. 6876, but the court will consider all briefs filed in that case as being filed herein." Thus the court had the advantage of the many briefs, including numerous *amicus* briefs filed in response to a general invitation, that had been submitted in the *United Medical Equipment* case, which had been mooted by settlement prior to decision. The instant parties, including the Commonwealth of Puerto Rico, were afforded the opportunity to file additional briefs.

Among the points raised and discussed in the briefs in the *United Medical Equipment* case, and thus incorporated by reference in the instant appeal, was the

contention that the unique status of the Commonwealth of Puerto Rico under its compact with the Congress of the United States made the doctrine of abstention peculiarly appropriate in a situation involving the construction and validity of a Puerto Rican statute. It was urged that a federal court should abstain from construing such a statute and testing its constitutionality until the Supreme Court of Puerto Rico has had an opportunity to interpret the statute and to assess its validity under the Puerto Rican Constitution as well as under the United States Constitution.[4] This contention was reiterated by the appellant Fornaris in his motion for reconsideration of the District Court's order certifying the appropriateness of an interlocutory appeal. But the First Circuit's opinion in this case did not mention or resolve the abstention claim, although it did acknowledge that "we have the benefit of the opinion of the Puerto Rico Superior Court in *Construction Mach. & Supplies Corp. v. Construction Mach. Co.*, decided December 23, 1968, upholding the act's consitutionality." See p. 33, *infra*. But that decision was only that of the San Juan Section of the Superior Court.

The First Circuit vacated the judgment of the District Court and directed that judgment be entered in favor of the appellee Ridge Tool Company. This action was premised solely on the court's determination that the Puerto Rican Dealer's Act, in its original and unamended form, is violative of "the due process clause of the federal constitution" by virtue of its retroactive alteration of contractual relationships. Under the court's view, a pre-statutory franchise contract between a manufacturer and a dealer is converted by the Act from one terminable by either party without cause into one that can be terminated by the manufacturer only for "just

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[4] Such a contention was advanced in the *United Medical Equipment* case in the Brief for Amici Curiae La Electronica, Inc., and Wallace Torres Canet, pp. 28-30.

cause." Such a conversion was said to force the manufacturer to adopt "heavy contractual obligations that it never assumed," whereas a dealer "could have no legitimate expectation of non-terminable contracts."

In concluding that this change in property rights was so drastic in nature as to contravene due process concepts, the First Circuit did not specify whether it was the Due Process Clause of the Fifth Amendment or that of the Fourteenth Amendment that was involved. The court merely stated that it had "no thought that Puerto Rico is in a more favored position in this respect than is a state or the federal government," pp. 37-38, *infra*, and referred to an earlier opinion of its own, *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953), proclaiming that "the important point is that there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States." And while the First Circuit relied upon cases arising under the constitutional prohibition against impairing the obligation of contracts, the court did not rest its decision upon the Contract Clause inasmuch as "the due process clause of the federal constitution provides essentially the same restraint so far as retrospectivity is concerned." See p. 37, *infra*.

THE QUESTION OF JURISDICTION

The appellant has invoked this Court's appeal jurisdiction under 28 U.S.C. §1254(2), which provides that cases in the United States courts of appeals may be reviewed by this Court

> "By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented."

In this case the appellant has relied upon a Puerto Rican statute that the First Circuit has held to be invalid as repugnant to the Due Process Clause of either the Fifth Amendment or of the Fourteenth Amendment of the Constitution of the United States. The obvious question that arises is whether a Puerto Rican statute is a "State statute" within the meaning of §1254(2).

While there is no definitive ruling by the Court on this question, appellant submits that every relevant consideration leads to the conclusion that a Puerto Rican statute is a state statute in the §1254(2) sense and that an appeal properly lies in this instance. Puerto Rico is not a state, constitutionally speaking. But the judicial and legislative characteristics of its autonomous commonwealth status, combined with the applicability to Puerto Rico of at least the due process provisions of the United States Constitution,[5] have led to the treatment of Puerto Rico as the equivalent of a state for jurisdictional purposes in this Court. No exception is apparent as to §1254(2).

To begin with, Congress has provided in 28 U.S.C. §1258 for the review by this Court of final judgments of the Supreme Court of Puerto Rico.[6] It has specified, in

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[5] "The question of what U.S. Constitutional provisions apply to Puerto Rico is unclear. . . .The constitutional restrictions upon a State of the Union with respect to the regulation of interstate and foreign commerce (Art. I, sec. 8, clause 3) and prohibitions upon the levying of duties or imposts upon imports (Art. I, sec. 10, clause 2) were held not to apply to Puerto Rico prior to Public Law 600 (64 Stat. 319, 48 USC Sections 731b-731e). Due process is the only constitutional requirement specifically held to be applicable to Puerto Rico, although whether it is the 5th or 14th amendment is not clear." Report of the United States–Puerto Rico Commission on the Status of Puerto Rico, pp. 44-45 (Aug. 1966).

[6] Section 1258 was enacted in 1961. For review purposes, the statute accords to the Puerto Rico Supreme Court the status of the highest court of a state and was deemed to be "appropriate in view of the change in the status of Puerto Rico from that of a territory to that of an associated commonwealth under the Act of Congress." H. Rep. No. 683, 87th Cong., 1st Sess., p. 2 (1961).

language identical to that used in §1257 as to the review of judgments of the highest courts of states. The types of judgments of the Puerto Rican court that may be reviewed by appeal and by certiorari. Thus an appeal lies under §1258 (2) where the judgment is in favor of the validity of a Puerto Rican statute in light of the United States Constitution.

Soon after the enactment of §1258 this Court promulgated Rule 61, which provides that

> "The term 'state court' when used in these rules includes the Supreme Court of the Commonwealth of Puerto Rico, and references in these rules to the law and statutes of a state include the law and statutes of the Commonwealth of Puerto Rico."

This provision reflects a general jurisdictional treatment by this Court of Puerto Rican courts and Puerto Rican statutes as the equivalents of state courts and state statutes. While the main purpose of Rule 61 undoubtedly was to implement §1258, Rule 61 also serves generally to give a Puerto Rican content to the phrase "statutes of a state." Thus when Rule 15(1)(v) speaks of the involvement for appeal purposes of "the validity of the statute of a state," Rule 61 encompasses within that phrase a Puerto Rican statute. And since Rule 15 (1) (v) is obviously applicable to appeals other than those arising under §1258(2), the Puerto Rican inclusion has relevance wherever an appeal can be said to involve "the validity of the statute of a state."

The reference in §1254(2) to "a State statute held by a court of appeals to be invalid" under the United States Constitution—a concept identical in nature to the many references to state statutes throughout the Rules of this Court—has in effect been interpreted by this Court's Rule 61 as including the laws and statutes of the Commonwealth of Puerto Rico. To conclude otherwise is

to ascribe to the reference in §1254(2) to "a State statute" a different and more restrictive meaning than that given to it in the Rules of this Court. Indeed, in view of the effort by Congress in §1258 to equate Puerto Rican courts and statutes with state courts and statutes, no reason is apparent for treating a Puerto Rican statute as other than a state statute when the decision as to its constitutional validity happens to be rendered by the First Circuit rather than by the Puerto Rican Supreme Court. An appeal should thus be considered proper under §1254(2) in this case.

Should the Court be of the view that an appeal is improper under these circumstances, appellant requests that the Court exercise its power under 28 U.S.C. §2103 to treat this jurisdictional statement as a petition for writ of certiorari and to take appropriate action on that basis. See *El Paso v. Simmons*, 379 U.S. 497, 501-503 (1965). As explained in the *El Paso* case, this power to treat an improvident appeal as a request for certiorari is in no way diluted by the provision of §1254(2) that an appeal "shall preclude review by writ of certiorari at the instance of the appellant." That provision "means only that if an appeal is proper and has been taken, certiorari will not thereafter be available."

A subsidiary problem of jurisdiction by way of appeal may be present as to the question here raised concerning the obligation of the lower federal courts to abstain from adjudicating the federal constitutional question pending a decision by the Puerto Rican Supreme Court as to the interpretation and scope to be accorded the Dealer's Act in question. Section 1254(2) restricts review on appeal "to the Federal questions presented." While it is not clear whether such reviewable federal questions include only those relating to the validity of the statute or whether they also cover federal questions in the case pertaining to other matters, appellant submits that the abstention problem is so intimately entwined with the propriety of the federal

court's decision invalidating the statute as to be considered a part of or related to the federal constitutional question. If that be true, this Court can clearly consider the abstention problem as a facet of this appeal under §1254(2).

THE QUESTIONS ARE SUBSTANTIAL.

1. The decision below creates novel problems of constitutional power to control the widespread practice of arbitrary cancellation of franchise agreements.

The First Circuit's determination in this case finds no direct or indirect precedent in the decisions of this Court. And that determination has created problems of the first magnitude in both the constitutional and the business-world sense.

Basically at stake here is the power of government—be it the Commonwealth of Puerto Rico, any of the fifty state governments, or even the federal government—to impose civil sanctions on or otherwise control the widespread practice of arbitrary cancellation by manufacturers of franchise dealers' contracts. Franchising itself is a highly significant business practice. It has been estimated that franchising accounts for 10 per cent of the gross national product and 25 per cent of all retail sales; from $70 to $91 billion worth of goods and services are sold annually in the United States through the 400,000 businessmen who are franchisees.[7] But the disparity of economic power as between the franchisor and franchisee is frequently such as to permit the franchisor to insert into the franchise contract the right to terminate at will and without cause. And that arbitrary

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[7] See Report of the Federal Trade Commission Ad Hoc Staff Committee on Franchising, p. 6 (1969); Statement of Senator Hart in opening hearings of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 2607 and S. 2321, 90th Cong., 1st Sess., p. 1 (1967).

right has been used by unscrupulous manufacturers to insist upon unreasonable or illegal demands[8] or to cancel the contract outright without regard to the impact on the franchisee's business or the local economy.

Congress was sufficiently concerned about such franchise evils in the automobile industry that in 1956 it enacted the Automobile Dealers' Day in Court Act, 15 U.S.C. §§1221-1225. That act is premised on the Congressional determination "that in the automobile industry concentration of economic power has increased to the degree that traditional contractual concepts are no longer adequate to protect the automobile dealers under their franchises."[9] The Act itself authorizes damage suits by a franchised automobile dealer where the automobile manufacturer has failed to act "in good faith" in "terminating, canceling, or not renewing the franchise with said dealer." 15 U.S.C. §1222.

Since 1937, more than twenty states have enacted legislation designed to eliminate various unfair practices that have been inflicted by automobile manufacturers on franchised dealers.[10] Of those states, at least eight have

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[8]Unreasonable restrictions thereby imposed on the franchisee may have antitrust implications. See, e.g., *United States v. General Motors Corp.*, 384 U.S. 127, 143-144 (1966); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139-140 (1968). It has been noted that the "arbitrary or unreasonably oppressive termination of franchises as ancillary to any of the unlawful restraints in connection with franchise agreements aggravates the offensiveness and unlawfulness of such restraints." Report of the Federal Trade Commission Ad Hoc Staff Committee on Franchising, p. 36 (1969).

[9]H. Rep. No. 2850, accompanying S. 3879, 84th Cong., 2d Sess. (July 20, 1956), quoted in 3 U.S. Code Cong. and Admin. News, 84th Cong. 2d Sess., 1956, p. 4597.

[10]See, generally, Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 Yale L. J. 1135, 1169 (1957); Brown and Conwill, *Automobile Manufacturer-Dealer Legislation*, 57 Colum. L. Rev. 219 (1957); 7 Am. Jur. 2d, Automobiles and Highway Traffic, §347; 14 Blashfield, Automobile Law and Practice, pp. 341-345 (3rd ed., 1969); Annotation, 7 A.L.R. 3d 1173 (1966).

adopted statutes of a nature substantially similar to the federal proscription against bad faith termination or cancellation of automobile dealer franchise agreements.[11] The terminations which have been outlawed by these states have been variously described in the statutes as "unfair," "without just provocation," "without due regard to the equities of the dealer," and "without just cause," in contrast to the federal statute's concept of acting "in good faith" in terminating a franchise. With

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[11] The eight states that have enacted such legislation are:

1. *Wisconsin*—Wis. Stat. §218.01(3)(a)17 (1967). This statute prohibits an automobile manufacturer from cancelling or failing to renew a franchise "unfairly, without due regard to the equities of the dealer and without just provocation." It has been held on its face "to be a proper exercise of the police power." *Forest Home Dodge, Inc. v. Karng*, 29 Wis. 2d 78, 138 N.W. 2d 214 (1965); *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W. 2d 420 (1955).

2. *Minnesota*—Minn. Laws, Ch. 626 (1955). This statute makes it unlawful for any auto manufacturer "to cancel or refuse to renew the franchise. . .without just cause." Its constitutionality has been sustained in *Willys Motors v. Northwest Kaiser-Willys, Inc.*, 142 F. Supp. 469 (D. Minn. 1956).

3. *Iowa*—Iowa Code §322.3 (1966). This statute prohibits an auto manufacturer from terminating or failing to renew any franchise "without just, reasonable and lawful cause." Criminal sanctions are provided.

4. *Florida*—Fla. Stat. Ann. §320.64(8) (1968). Under this statute, an auto manufacturer's license may be denied if it has cancelled a franchise "unfairly or without regard to the equities of a motor vehicle dealer or without just provocation."

5. *North Carolina*—N. C. Gen. Stat. §20-305 (1965). This renders it unlawful for an auto manufacturer "unfairly without due regard to the equities of the dealer, and without just provocation, to cancel the franchise of such dealer."

6. *Rhode Island*—Pub. Laws of R. I., 1950, Ch. 2595, Art. VIII.

7. *New York*—N. Y. Gen. Bus. Law §197 (Supp. 1956). A proposal to amend and expand this law is now pending (proposed Assembly Act No. 739, 1969 Sess.).

8. *Colorado*—The Colorado statute, which used the same language as the North Carolina and Florida statutes, was held unconstitutionally vague in *General Motors Corp. v. Blevins*, 144 F. Supp. 381 (D. Colo. 1956).

the sole exception of the Colorado statute, wherein such words were held to be unconstitutionally vague,[12] these state statutes and the federal Act have withstood all constitutional challenges. Indeed, Chief Judge Aldrich, who wrote the opinion below, authored the leading opinion sustaining the validity of the federal Automobile Dealers' Day in Court Act. *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966).

Puerto Rico is the first jurisdiction to attempt to expand the scope of such legislation beyond automobile dealer franchises to encompass all types of dealer franchises; and it has done so using the federal statute as a model. At least three states, Massachusetts (H. 2279), New York (proposed Assembly Act No. 739) and California (S. 240), are considering similar legislation. In addition, a proposal (S. 1967, 91st Cong., 1st Sess.) is now pending in Congress to prohibit "bad faith" terminations by all types of franchisers. But the First Circuit's decision in this case has caused the Senate subcommittee considering S. 1967 "to indefinitely postpone" further action on the measure until this appeal is resolved (116 Cong. Rec. D501, May 19, 1970, Daily Ed.). The decision, moreover, has cast serious constitutional doubt on all the various state statutes and proposals dealing with franchise terminations. In fact, the decision, fairly read, seems to bring the federal Automobile Dealers' Day in Court Act under a constitutional due process cloud despite the earlier validation on other grounds in the *Volkswagen* case.[13]

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[12] See *General Motors Corp. v. Blevins*, 144 F. Supp. 381 (D. Colo. 1956). But in the instant case, the First Circuit stated that it did "not agree with the position of the opponents of the [Puerto Rican] act that the phrase 'just cause' is unconstitutionally vague and unspecific." See p. 39, *infra*.

[13] Chief Judge Aldrich sought in the opinion below to distinguish the federal Act from the Puerto Rican statute and thus to distinguish the *Volkswagen* ruling. See pp. 40-41, *infra*. He claimed that the federal Act does not convert terminable dealer contracts

(Footnote 13 continued on page 18.)

As will be seen, the constitutional grounds employed below to invalidate the Puerto Rican statute are at best tenuous and fully justify plenary review by this Court. But the importance and the impact of the decision below upon the federal and state legislative policies regarding dealer franchises are so great as to make such review most appropriate. And in Puerto Rico alone it has been reliably estimated that nearly 60 franchise terminations are or have been the subject of litigation in the federal and local courts; many of those cases that involve the constitutionality of the Dealer's Act have been stayed pending the outcome of the instant appeal.

The First Circuit itself recognized, pp. 32-33, *infra*, "the great importance of the [Puerto Rican] legislation," as a consequence of which "we issued a general invitation for amicus briefs" and "[m]any were filed." Its decision has served to enhance the importance of the problem and the need for review by this Court.

2. The decision below raises substantial issues of constitutional law and resolves them in a manner inconsistent with the decisions of this Court.

In essence, the First Circuit has held that the Puerto Rican Dealer's Act, by providing that existing franchises

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Footnote 13 continued:

into non-terminable ones but simply seeks to prevent contractually unjustified demands by giving a cause of action for damages resulting from unfair "coercion" and "intimidation." Actually, the same analysis could be made of the Puerto Rican statute.

But even so limiting the federal Act would not seem to meet the First Circuit's complaint in the instant case that established contractual rights cannot be altered retroactively. The contractual right to cancel the contract at will and without cause is no less altered by a statute outlawing such a right where the cancellation is motivated by "coercion" or "intimidation." The due process implications of altering that contractual right were not raised or explored in the *Volkswagen* case, however.

terminable at will can be terminated only for "just cause," constitutes a severe retroactive alteration of contractual obligations and hence violates the Due Process Clause of either the Fifth Amendment or the Fourteenth Amendment. That ruling constitutes a most questionable rearrangement of the United States Constitution and in the process resurrects constitutional doctrines long ago rejected by this Court. It would be unfortunate in the extreme if such a confused and unwarranted constitutional melange were left unreviewed and uncorrected.

A. The Constitutional Rearrangement

At the outset, the First Circuit is concededly unclear and uncertain whether Puerto Rico comes within the Due Process Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment. This uncertainty is understandable in view of the rather unique commonwealth status of Puerto Rico and perhaps some definitive resolution of the problem by this Court is now appropriate. If that issue is deemed relevant by this Court, it would be appellant's position that, in view of the enactment of Public Law 600 in 1950 and the subsequent development of its commonwealth status, Puerto Rico may most appropriately be considered not as a federal enclave within the scope of the Fifth Amendment but as a state within the contemplation of the Fourteenth Amendment. See *United States v. Valentine*, 288 F. Supp. 957 (D.P.R. 1968); 98 Cong. Rec. 6183, et seq.

But the uncertainty exhibited in this respect by the First Circuit has constitutional repercussions that reach beyond Puerto Rico. The critical constitutional elision promulgated here is that "the due process clause of the federal constitution" provides "essentially the same restraint [as the Contract Clause, Art. I. Sec. 10] so far as retrospectivity is concerned." By thus importing at least part of the Contract Clause into "the due process

clause," the court has created a major constitutional adjustment of an uncertain nature:

(1) If the First Circuit in fact or by intention has transferred the retroactive aspects of the Contract Clause to the Due Process Clause of the Fifth Amendment, then a new and unwarranted limitation has been placed on the Federal Government, as well as on other federal jurisdictions that may be subject to that Amendment. This Court long ago recognized the power of Congress to regulate in the public interest the relationships between private parties under existing contracts that interfere with the exercise of its constitutional authority; the Fifth Amendment does not inhibit such impairment of contract. *Continental Illinois National Bank v. Chicago, R. I. & P. R. Co.*, 294 U.S. 648, 680 (1935).

(2) On the other hand, if the First Circuit meant to incorporate the retroactive aspects of the Contract Clause into the Due Process Clause of the Fourteenth Amendment, a needless but nonetheless confusing constitutional rearrangement has occurred. The states and other jurisdictions subject to the Fourteenth Amendment's Due Process Clause are already subject to the Contract Clause provision in Article I, Section 10, that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." The problems and the repurcussions of this novel transfer of one independent provision into another need not here be explored, but they are formidable.[14] Not the least of those problems is whether, as the First Circuit seemingly assumed, the Contract Clause is divisible into retroactive and non-retroactive parts so that a transfer thereof to the Due

[14]The First Circuit's statement that the Due Process Clause provides the same retrospective restraint as the Contract Clause was accompanied by no citation of authority. Suffice it to say that none exists. As respects the Fourteenth Amendment's Due Process Clause, however, the court may have confused Contract Clause doctrines with the freedom to contract—an entirely different concept that is incorporated in the Fourteenth Amendment. See *Alaska Packers Assn. v. Industrial Accident Comm.*, 294 U.S. 532 (1935).

Process Clause may be made only "so far as retrospectivity is concerned."

Such constitutional rearrangements, particularly of so confused a nature, certainly deserve consideration by this Court before they become embedded in federal jurisprudence.

B. The Contract Impairment and Due Process Misconceptions

The First Circuit has outlawed the Puerto Rican Dealer's Act by reliance upon what it conceived to be the constitutional concepts of due process and impairment of contract obligations. But the concepts were grossly misconceived and the relevant decisions of this Court were either misread or ignored.

The constitutional errors so patent in the opinion below stem principally from the court's refusal to give more than lip service to the established police power of Puerto Rico to safeguard what it conceives to be the vital interests of its people and its economy. The court acknowledged but rejected the public purposes underlying the legislation penalizing arbitrary cancellation of franchises—the frustration of dealers' legitimate expectations and interests, the resulting instability of local investments and export of profits, and the loss of some business to Puerto Rico's detriment.[15] See pp. 34-35, *infra*.

The First Circuit had earlier found that precisely the same type of considerations constituted "a sufficient public purpose" and "could be found to redound to the

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[15] The court also quoted from the Puerto Rico legislature's Statement of Motives, which stated that "reasonable stability in the dealer's relationship in Puerto Rico is vital to the general economy of the country, to the public interest and to the general welfare" and that it was necessary to regulate that relationship "so as to avoid the abuse caused by certain practices." See p. 34, *infra*.

ultimate benefit of the public at large" so as to justify the exercise of federal power in the form of the Automobile Dealers' Day in Court Act. *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 445 (1st Cir. 1966). But in the Puerto Rican situation the court labeled such legislative considerations as mere "sounding phrases" and proceeded to make its own contrary determinations. The legislative assertion that arbitrary termination of dealership contracts frustrated the legitimate expectations of the dealers, said the court, "cannot possibly be true" since they "could have no legitimate expectation of non-terminable contracts." See p. 39, *infra*.

Having thus rejected the legislative findings, the court proceeded to treat the constitutional notions of contract impairment and due process in a manner that raises most serious problems worthy of this Court's review:

(1) The court viewed the contract impairment problem as one to be solved solely by a judicial determination of whether the alteration was "minor" or of "great magnitude." If the legislation "drastically" affected property or contract rights, said the court, there was in effect a *per se* violation of the Contract Clause.

Such an analysis of this constitutional proscription finds no precedent in the decisions of this Court. Rather, this Court has emphasized repeatedly that the prohibition "is not an absolute one and is not to be read with literal exactness like a mathematical formula," *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 428 (1934), and is "qualified" by the state's "authority to safeguard the vital interests of its people," *Ibid.*, 434-435. And once the public interest in altering contracts has been asserted, as Puerto Rico has here done, a court "must respect the 'wide discretion on the part of

the legislature in determining what is and what is not necessary.'" *East New York Savings Bank v. Hahn*, 326 U.S. 230, 233 (1945). The critical factor thus is not the fact or the extent of the impairment but the reasonableness or necessity of the exercise of the state police power. See *El Paso v. Simmons*, 379 U.S. 497, 506-509 (1965).

(2) In transferring the constitutional prohibition against contract impairment into the contours of "the due process clause . . . so far as retrospectivity is concerned," the First Circuit has totally ignored the constitutional proposition that, in evaluating economic legislation in light of the Fourteenth Amendment's Due Process Clause, courts do not substitute their social and economic beliefs for the judgment of legislative bodies. That proposition, most forcefully restated in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), completely undermines the First Circuit's rejection of the findings of the Puerto Rican legislature. As stated in *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952), "the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standards of the public welfare . . : so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided."

It thus becomes appropriate for this Court to remind the federal judiciary once again that neither the Contract Clause nor the Due Process Clause has the effect of overriding the power of the states, or of Puerto Rico, to establish regulations reasonably necessary to secure the general welfare of the community and the economy. By that established standard the Puerto Rican Dealer's Act cannot be considered violative of the Due Process Clause of either the Fifth or Fourteenth Amendment.

3. Serious problems stem from the failure to abstain from resolving the constitutionality of the Puerto Rican statute where (a) the Puerto Rico Supreme Court has not yet interpreted the statute, and (b) the factual record is too incomplete to permit precise formulation and application of constitutional rules.

The refusal of the courts below to abstain from resolving the constitutionality of the Dealer's Act pending an authoritative interpretation thereof by the Supreme Court of Puerto Rico constitutes a most serious matter warranting this Court's attention. It is a problem that is aggravated by the circumstance that the action of the Puerto Rican legislature has been invalidated in the context of an interlocutory appeal from the denial of a preliminary motion to dismiss, the facts relevant to the applicability of the statute not having been developed.

Without knowing which sections of the Dealer's Act might become pertinent once the facts of this case were developed, the First Circuit has engaged in a free-wheeling search for sections to interpret in a manner to lend support to its conclusion that the Act is invalid in its entirety.[16] That the court's interpretations are questionable and doubtful is not surprising, particularly in view of the absence of concrete facts by which to test the interpretations.[17] But the important point is that the

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[16] Section 6 of the Act, as originally adopted in 1964, provided that if any clause, paragraph, article, section or part of the Act be declared unconstitutional "said judgment shall not affect, impair or invalidate the rest of this act." But without sufficient facts to determine which sections of this Act were applicable, it is impossible to tell which sections, if any, are unimpaired by the decision below.

[17] Among the questionable interpretations of the Act advanced by the First Circuit are:

(1) The court gave a narrow and crippling interpretation of the critical statutory concept of "just cause" for franchise termination. See pp. 39-40, *infra*. But while its opinion is not authoritative, the Superior Court of Puerto Rico in the *Construction Machinery*

(Footnote 17 continued on page 25.)

First Circuit's interpretations are not and cannot be the authoritative interpretations. Only the Supreme Court of Puerto Rico can supply such interpretations. And only those authoritative interpretations, viewed in the context of a fully developed fact situation, should be subjected to the delicate process of constitutional adjudication.

While abstention is not an absolute requirement in any case of constitutional adjudication, its use in this case would appear especially appropriate by virtue of the following circumstances:

(1) Puerto Rico is a commonwealth and there exists "the unique historic relationship between the

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Footnote 17 continued:
case (see p. 57, *infra.*), has already indicated that this concept of just-cause is to be interpreted case by case and is dependent upon the particular facts of each case; the content of "just cause" is to be supplemented by precepts drawn from other laws of Puerto Rico and other doctrines of the civil law, such as impossibility of performance.

(2) The Act was said to provide that a Puerto Rico dealer's contract, "regardless of its provisions for termination was, with certain exceptions, renewable indefinitely at the option of the dealer, and imposed substantial damages upon a manufacturer who refused to accede." See p. 32, *infra.* But the Act does not in terms deal with options to renew indefinitely; nor is the Act concerned with simple failures to renew. All that the Act deals with is the injurious unfair practice of terminations without just cause.

(3) The Act was said to provide that a manufacturer "may never terminate, *regardless of the provisions of the contract,* or refuse to renew the dealership on an agreed expiration date, except for just cause." See p. 35, *infra.* But in fact the statute recognizes that the franchisor may legally terminate on the ground, among others, that the franchisee has failed to perform any of the essential obligations of the contract. See §278(d), definition of "just cause."

(4) The Act was said to be mandatory in its damages provision and to tie the hands of the court in assessing the amount of damages in a given case. See pp. 35-36, *infra.* But the damage section, §278b, itself states that indemnification is limited to the extent of damages caused the franchisee, and that the value of good will to be considered is to encompass any factor that will help establish "equitably" the amount of good will for which indemnification must be paid.

Congress and the Commonwealth of Puerto Rico" (*Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966)). Respect for Puerto Rico's status and the necessity of avoiding any possible irritant in the relationship between the United States and Puerto Rico dictate that the federal judiciary refrain from acting hastily in voiding Puerto Rican legislation prior to an authoritative interpretation by the appropriate body, the Puerto Rico Supreme Court. See *Bonet v. Texas Co.*, 308 U.S. 462 (1940); *Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505 (1939); *Alcoa Steamship Co. v. Perez Perez*, 295 F. Supp. 187, 197 (D.P.R. 1968). The avoidance of such possible irritants is a primary reason for invoking the abstention doctrine. See *Reetz v. Bozanich*, 397 U.S. 82, 86-87 (1970). As was said by Judge Maris, speaking for a three-judge district court in *Wackenhut Corporation v. Aponte*, 266 F. Supp. 401, 405 (D.P.R. 1967), affirmed, 386 U.S. 268:

> "We think that the application of the doctrine of abstention is particularly appropriate in a case such as the present one which involves the construction and validity of a statute of the Commonwealth of Puerto Rico. For a due regard for the status of that Commonwealth under its compact with the Congress of the United States, dictates, we believe, that it should have the primary opportunity through its courts to determine the intended scope of its own legislation and to pass upon the validity of that legislation under its own Constitution as well as under the Constitution of the United States."

(2) The special respect due Puerto Rico serves to underscore the classic reason why abstention is proper in these circumstances—the possibility that the Supreme Court of Puerto Rico might so interpret the statute as to

eliminate the federal constitutional objections discovered by the First Circuit.[18] Or the statute might be invalidated under the provisions of the Puerto Rican Constitution proscribing impairment of contracts or deprivations of property without due process of law (Article II, Section 7). Such issues under the Puerto Rican Constitution were encompassed by the motion to dismiss filed by the Ridge Tool Company. On that basis, abstention could be ordered while the parties repair to the Puerto Rican tribunals to secure an authoritative declaration as to the statute's meaning and its validity under the Puerto Rican Constitution. See *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639, 640-641 (1959); *Reetz v. Bozanich*, 397 U.S. 82, 85-87 (1970).

(3) The desirability of awaiting an authoritative statutory analysis by the Puerto Rico Supreme Court is augmented by the retrospective gloss that the First Circuit gave to the statute. It is the first rule of construction "that legislation must be considered as addressed to the future, not to the past" and that "a retrospective operation will not be given to a statute" unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); *Greene v. United States*, 376 U.S. 149, 160 (1964). Thus a federal court should be most reluctant in the first instance to read a state statute as retrospective in nature. Before that analysis is used for constitutional adjudication, the authoritative local tribunal should be given the opportunity to affirm or deny the retrospective

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[18] For example, the "just cause" concept of the statute might be so broadly construed by the Puerto Rico Supreme Court that the statute, as applied to a particular case, could not be said to result in penalizing the original termination rights of the manufacturer.

thrust of the statutory language and the retrospective intentions of the local legislature.[19]

(4) Finally, the lower courts should have abstained from adjudicating the constitutional validity of the Dealer's Act in the absence of an established set of facts. Without such facts, a declaration as to the invalidity of an important Puerto Rican statute becomes an advisory opinion and a gratuitous frustration of the announced will of the Puerto Rican legislature.

No federal court should attempt a constitutional adjudication of a statute "unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905). But here the claims and the record could in no sense be said to have combined to create an inescapable federal constitutional controversy. The federal constitutional issues that were decided stemmed from a highly generalized claim in the motion to dismiss that the Dealer's Act was "void and unconstitutional," no reference being made to any clause of the Federal Constitution. See pp. 5-6, *supra*. And the resolution of the federal issues that did occur in the courts below took place in a factual vacuum. At no point in this proceeding has the record consisted of anything more than (a) the complaint, alleging generally that there was a franchise agreement between the parties that was terminated in 1966 illegally and without just cause, and (b) the motion to dismiss, containing general allegations of voidness and unconstitutionality.

There has never been any proof or concession of the sketchy facts set forth in the complaint. No answer has been filed and no defenses have been raised. There is

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[19] The Supreme Court of Puerto Rico should also have the opportunity to assess and evaluate the Dealer's Act as a segment in the Puerto Rican antitrust legislation. Possible antitrust implications of arbitrary franchise terminations might have an impact on the way in which the Dealer's Act is construed.

no claim or evidence regarding the contents of the alleged franchise agreement or the nature of its termination provisions. The record gives no certain clue to the circumstances of the creation and termination of the agreement. No one can say what defenses of a non-constitutional nature might be raised and become dispositive of the case. And no one can say precisely what provisions of the Dealer's Act will become operative once the facts are developed.

In short, there is no factual basis for refining or resolving the federal constitutional questions. Long ago this Court warned that federal courts should never "anticipate a question of constitutional law in advance of the necessity of deciding it" and should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners*, 113 U.S. 33, 39 (1885). And it gave that warning in circumstances identical to those here involved, where the "precise facts" had not yet been determined at an early stage of the litigation. See also *United States v. Raines*, 362 U.S. 17, 21 (1960).

The lower courts should thus have abstained from engaging in the important and delicate task of constitutional adjudication at least until the precise facts essential to that adjudication have been established. And the First Circuit's acceptance of the interlocutory appeal in these circumstances can only be viewed as an impermissible acceptance of an invitation "to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitively perceived." *Electric Bond & Share Co. v. S. E. C.*, 303 U.S. 419, 433 (1938).

Corrective action by this Court is obviously necessary.

CONCLUSION

For these various reasons, the Court should note probable jurisdiction over this appeal. In the words of Rule 15(1)(f), "the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution."

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 7422

ARTURO FORNARIS, JR.,

PLAINTIFF, APPELLEE,

v.

THE RIDGE TOOL CO. et al.,

DEFENDANTS, APPELLANTS,

and

THE COMMONWEALTH OF PUERTO RICO,

INTERVENOR.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Edward M. Borges and *O'Neill & Borges* on brief for appellants.

Francisco de Jesus Schuck and *Fiddler, Gonzalez & Rodriguez* on brief for appellee.

Gilberto Gierbolini, Solicitor General, and *Ida Cardona-Hernandez de Orenstein*, Assistant Solicitor General, on brief for Commonwealth of Puerto Rico, intervenor.

Eduardo Negron Rodriguez and *Baragano, Trias, Saldana & Francis* on brief for appellant in No. 6876.

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Sutton Keany, Merrell E. Clark, Jr., Terrence H. Benbow, Robert W. Gray, McConnell, Valdes, Kelley & Sifre and *Winthrop, Stimson, Putnam & Roberts* on joint brief of appellee and Bristol-Myers Company et al., amici curiae in No. 6876.

Edward M. Borges, Philip A. Ryan, O'Neill & Borges and *Baker & McKenzie* on brief for Economics Laboratory, Inc., et al., amici curiae in No. 6876.

Thomas V. Koykka, Edward D. Crocker, Walter A. Bates, William W. Taft and *Arter, Hadden, Wykoff & Van Duzer* on brief for Eaton Yale & Towne, Inc., amicus curiae in No. 6876.

Stanley L. Feldstein, Salvador Antonetti Zequeira and *Nachman, Feldstein, Laffitte & Smith* on brief for La Electronica, Inc., et al., amici curiae in No. 6876.

Arturo Estrella and *Baragano, Trias, Saldana & Francis* on brief for Felix A. Rodriguez, Inc., amicus curiae in No. 6876.

Mariano Canales Delgado and *McConnie, Canales & Ferrer* on brief for Carlos M. Ruiz, amicus curiae in No. 6876.

March 17, 1970.

ALDRICH, *Chief Judge.* On June 24, 1964 the Puerto Rico legislature enacted the so-called Dealer's Contract Law known as Law 75. 1964 Laws of Puerto Rico, 4th Sess., at 231 (approved June 24, 1964). Its exact terms we will come to presently, but in effect this statute provided that a Puerto Rico dealer's contract with a "principal," hereinafter manufacturer, regardless of its provisions for termination was, with certain exceptions, renewable indefinitely at the option of the dealer, and imposed substantial damages upon a manufacturer who refused to accede. On June 23, 1966 the scope of the obligation was enlarged to forbid the manufacturer from performing, irrespective of the provisions of the contract, "any act detrimental to the established relationship." 10 L.P.R.A. § 278a (1968 supp.). In spite of this legislation a number of manufacturers acted to terminate or otherwise change their dealers' agreements, and much litigation has ensued. Because of diversity of citizenship the bulk, apparently, of the cases were removed to the district court, where the defendants raised constitutional and other defenses. The court resolved these defenses in the plaintiff's favor in *Ruiz* v. *Economics Laboratory, Inc.*, D.P.R., 1967, 274 F. Supp. 14, and in the defendant's favor, in a more limited situation, in *United Medical Equipment Corp.* v. *S. Blickman, Inc.*, D.P.R., 1966, 260 F.Supp. 912. In the *Blickman* case the plaintiff appealed, and because of the great importance of the legislation we issued a general invi-

tation for amicus briefs. Many were filed. We specially invited the Commonwealth to brief and argue the question of constitutionality, which it graciously did.

After argument, but before we had completed our opinion, the *Blickman* case (No. 6876) was settled, mooting the appeal. Thereafter we were asked to accept an interlocutory appeal in the present case pursuant to 28 U.S.C. § 1292(b). The parties did not request oral argument. By order we took the appeal on the briefs of the parties and transferred all earlier briefs, amicus and otherwise, filed in the *Blickman* case. We invited the Commonwealth to file a supplemental brief, which it has done. In addition, we have the benefit of the opinion of the Puerto Rico Superior Court in *Construction Mach. & Supplies Corp.* v. *Construction Mach. Co.*, decided December 23, 1968, upholding the act's constitutionality.

In the present complaint plaintiff Fornaris, a citizen of Puerto Rico, alleges that for twenty-nine years he had been the exclusive distributor in Puerto Rico of merchandise manufactured by the defendant The Ridge Tool Company, an Ohio corporation; that on November 26, 1965, effective as of April 15, 1966, defendant "cancelled and/or terminated, without just cause the distributorship contract," contrary to the law of Puerto Rico.[1] It is not alleged that the termination was contrary to the terms of the contract itself, and we assume that it was in accordance therewith, and that plaintiff's rights depend solely upon Law 75. Defendant moved to dismiss on the ground that this law is unconstitutional, stating various reasons therefor. The court denied the motion on the basis of its opinion in *Ruiz* v. *Economics Laboratory, Inc.*, *supra*, and defendant appeals.

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[1] This must have meant Law 75, as plaintiff's action was prior to the 1966 amendment. We do not, in this opinion, reach the amendment except to observe the obvious, that it presents many additional problems.

Before considering the precise terms of Law 75 it is pertinent to review the circumstances that led to its passage, and the declared purposes sought to be achieved. The legislature appended the following statement.

"STATEMENT OF MOTIVES

"The Commonwealth of Puerto Rico can not remain indifferent to the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, concessionaries [sic], or agents, as soon as these have created a favorable market and without taking into account their legitimate interests.

"The Legislative Assembly of Puerto Rico declares that the reasonable stability in the dealer's relationship in Puerto Rico is vital to the general economy of the country, to the public interest and to the general welfare, and in the exercise of its police power it deems it necessary to regulate, insofar as pertinent, the field of said relationship, so as to avoid the abuse caused by certain practices."

We take this statement to be a summary of, and to represent an adoption of, the unanimous Report of the Committee on Industry and Commerce recommending the act in the form that it was eventually passed. The committee stated that it proposed the law because terminating dealerships "as soon as these have created a favorable market for their products, frustrat[ed] the legitimate expectations and interests of those who have so efficiently fulfilled their responsibilities."[2] See, generally, 18 Diario de Sesiones, Asambla Legislativa (Camara), May 22, 1964, pp. 1723-25. With respect to the "reasonable stability in the dealer's relationship," further amplification is to be found in 34 Rev. Jur. de la U.P.R. 497, quoted at length in the *Con-*

[2] For this, and certain other quotations, we rely upon translations from the Spanish furnished by various parties and not contradicted.

struction Machinery opinion. Briefly, it was felt that cutting off dealers, with the manufacturer establishing its own sales office or branches, leads to instability of local investments and to the export of profits. Conversely, if manufacturers can terminate with impunity, some may withdraw altogether. Some Puerto Rico branches are marginal compared with other branches in the United States, and consequently are the first to be closed in case of declining business, to Puerto Rico's detriment.

We have gone into this background supplied by the parties not only because it shows the purposes of the act, illuminating the propriety, or possibly, impropriety, of its provisions, but also because of the assistance it may give in resolving doubts as to the statutory meaning. Law 75 itself is relatively brief. A manufacturer may never terminate, regardless of the provisions of the contract, or refuse to renew the dealership on an agreed expiration date, except for "just cause." Law 75, § 2, 1964 Laws of Puerto Rico at 232 (approved June 24, 1964).[3] "Just cause" is legislatively defined as substantial failure of performance by the dealer.[4] In case of breach of the statutorily imposed obligation, damages "shall be fixed on the basis"[5] of a specified list of items. Law 75, § 3. These are substantial, particularly with respect to awarding the dealer the entire good will value of the agency without inquiry or adjustment for what portion may have been due to the acts of

[3] "Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may terminate said relationship or refuse to renew said contract on its normal expiration, except for just cause."

[4] "[J]ust cause: nonperformance of any of the essential obligations of the dealer's contract, on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service." Law 75, § 1(d).

[5] It was conceded during the oral argument of the *Blickman* case that the Spanish, "se fijará a base" is mandatory.

the manufacturer, or even of prior dealers. To this figure is added, cumulatively the Commonwealth concedes, the amount of profits for the past five years. Law 75, § 3(d).[6] There is no provision for mitigation should it appear that the dealer had successfully transferred into an equally profitable line. Even apart from such lack of offsets, the award of both good will and loss of profits amounts to duplication. The parties are precluded from agreeing otherwise. Law 75 § 4.

In upholding the constitutionality of the application of the act to the present defendant the district court, as did the superior court in the comparable case, relied upon the police power. There can be no question but that this power permits the legislature to remedy various economic evils. All courts recognize, however, that retrospective legislation, affecting established rights and relationships, presents an additional problem. While the legislature may prevent an employee willing to contract to work for a low wage from doing so, *West Coast Hotel Co.* v. *Parrish*, 1937, 300 U.S. 379, the retrospective imposition of a minimum wage would be quite a different matter. *See Luce & Co.* v. *Minimum Wage Board*, 1943, 62 P.R.R. 431, *aff'd* 1 Cir., 1946, 155 F.2d 983, where the court stated, in dictum, that a statute granting additional benefits for "services entered into and executed . . . before the same went into effect . . . would be unconstitutional, since it would deprive the employers of their property without due process of law." 62 P.R.R. at 449. We cannot agree with the many arguments,

[6] If the dealer has been in business less than five years, an appropriate multiple is provided to determine the equivalent of five years. It may be noted that the effect of this provision is exactly to contradict the declared reason for the act — that dealers are cut off "as soon as they have developed a favorable market." On that basis their past profits would be negligible. If, however, the dealer had not received this unfortunate treatment, but had been permitted a long, prosperous career to reward him for his entrepreneur services, then his award under this section would be substantial.

variously advanced, that the case at bar does not involve similar retrospectivity. If at the time that Law 75 was passed a manufacturer had contracts with dealers that he could terminate at will without liability, and thereafter, because in the opinion of the legislature such a result would deprive the dealers of their expectations based upon their having "so efficiently fulfilled their responsibilities" it must make substantial payments on termination, we can only regard this as increased payment for past services. Indeed, if it is not, it is an amendment of the contract to require an outright gratuity.

We need not deal with a constitutional prohibition against impairing the obligation of contracts,[7] because the due process clause of the federal constitution provides essentially the same restraint so far as retrospectivity is concerned.[8] We have no thought that Puerto Rico is in a more favored position in this respect than is a state or

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[7] The argument goes that Puerto Rico is not subject to certain constitutional restrictions because not a "state." *Cf. Buscaglia v. Ballester*, 1 Cir., 1947, 162 F.2d 805. However, the Puerto Rico Constitution contains a provision comparable in this respect to the federal Bill of Rights. Puerto Rico Constitution Art. II, § 7. Since this provision might be said to have been imposed by Congress, see Act Mar. 2, 1917, c. 145, § 2, 39 Stat. 951, as amended, 41 Stat. 1096, 47 Stat. 158, 48 Stat. 361, 61 Stat. 772, repealed, except for last paragraph, Act July 3, 1950, c. 446 § 5(1), 64 Stat. 320, an argument might be made in favor of the federal court's interpretative and enforcement powers by one route or another. By suggesting the question we do not suggest the answer.

[8] "Although there is no clause expressly forbidding the federal government to pass laws impairing the obligation of contracts, any federal law impairing them in a manner which the Supreme Court deemed unreasonable would doubtless be held to be a deprivation of property without due process, contrary to the Fifth Amendment." Hale, The Supreme Court and the Contract Clause: III, 57 Harv. L. Rev. 852, 890 (1944). *Accord*, Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 695 (1960); *Cf. Lynch v. United States*, 1934, 292 U.S. 571, 579; *Thorpe v. Housing Authority*, 1969, 393 U.S. 268, 278-79, nn. 31-32.

the federal government. *Figueroa Ruiz* v. *Delgado*, 1 Cir., 1966, 359 F.2d 718, 723-24, *Mora* v. *Mejias*, 1 Cir., 1953, 206 F.2d 377, 382. *See* 48 U.S.C. § 731d; Joint Resolution, 66 Stat. 327. (July 3, 1952). Hence only minor infringement of established contractual rights may be effected without just compensation. "Police power" is not a magic word that permits the legislature to adjust any and every found economic ill without payment.

In determining whether retroactive alteration of contractual provisions are sufficiently minor to be permissible a distinction is sometimes drawn between alteration of substantive rights and alteration of procedures or remedies. *See Stockholders of Peoples Banking Co.* v. *Sterling*, 1937, 300 U.S. 175, 180-83 (alternative holding). However, even the latter may infringe constitutional rights, Hale, *supra* n. 8, at 533-57, *W. B. Worthen Co.* v. *Kavanaugh*, 1935, 295 U.S. 56, while the former can sometimes be tolerated if the effect is not too severe. *El Paso* v. *Simmons*, 1965, 379 U.S. 497, 503-09. Essentially, the question is, how drastically have property rights been affected, and, particularly, how great is the change viewed in the light of the reasonable expectations of the parties when the contract was entered into. *See El Paso* v. *Simmons*, *supra*; *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 1934, 290 U.S. 398. The distinction is one of degree. For example, emergency statutes allowing a tenant to stay beyond the term of his lease upon payment of reasonable rent have been upheld as reasonable alterations, *Block* v. *Hirsh*, 1921, 256 U.S. 135; *Marcus Brown Holding Co.* v. *Feldman*, 1921, 256 U.S. 170, whereas a statute which would have destroyed a mining company's reserved right to mine coal underneath land, the balance of which had been sold by it, has been invalidated as working a change of too great magnitude. *Pennsylvania Coal Co.* v. *Mahon*, 1922, 260 U.S. 393. See generally Hochman, *supra* n. 8, at 711-17.

While we recognize a strong obligation to support legislative findings, the Report of the Committee on Industry and Commerce to the effect that the termination of dealerships in terms revocable at will was "frustrating the legitimate expectations" of the dealers cannot possibly be true. Dealers may have had hopes; they could have no legitimate expectation of non-terminable contracts. *Cf. Castillo v. Smart Products, Inc.*, D.P.R., 1968, 289 F.Supp. 138. Sounding phrases, and calling the failure to make termination payments an "abuse," cannot change the fact that the manufacturer has been forced into heavy contractual obligations that it never assumed. No amount of research by parties or amici has discovered a case suggesting that to convert a contractual relationship terminable by either party without cause into one which, short of breach by the other party, can be terminated by one of the parties only by making substantial payments and without protection for the other party's economic interests, is not a change of great magnitude.[9]

We do not agree with the position of the opponents of the act that the phrase "just cause" is unconstitutionally vague and unspecific. However, the Commonwealth's protestation, in the *Blickman* brief, that it "cannot conceive that the Legislature, which was enacting a remedial statute to correct an injustice, could have intended and permitted, through legislation, the perpetration of another injustice," is far more pious than persuasive. To our comment that the statute is one-sided, the Secretary of Justice on behalf of the Commonwealth, urged us to read it in the light of various general provisions of Puerto Rico law applicable

[9] If we may be forgiven a rude comparison, the change seems comparable to a legislative retrospective conversion, in the asserted interest of public morals, of all temporary liasons into marriage, with the necessity of divorce and alimony. Indeed, it is worse, for until Law 75 was enacted temporary dealerships were in all respects legal.

to the construction of contracts. This we have done. We end up convinced that the only defense open to a manufacturer to an action under Law 75, short of proof of breach by the dealer, would be impossibility of performance. 31 L.P.R.A. § 3193. To add to "just cause," as was suggested, good faith, or the legitimate interests of the manufacturer, would be to fly in the face both of the unambiguous statutory provisions, and the equally unambiguous legislative history. The fact that a dealership has become economically highly disadvantageous is not excusable impossibility, but is, precisely, a contingency that the legislature sought to guard against.

Some of the proponents of the act invite a comparison with the federal Automobile Dealers Day in Court Act, 15 U.S.C. § 1221-25, hereinafter the Federal Act. The comparison is ill-taken. In fact, it is precisely to the extent that Law 75 departs from the provisions of that statute that it is in difficulties.

The unusual position in which automobile dealers find themselves has long been known to this court.[10] Because they are normally locked in, with no other source of income and no easy opportunity to convert to other lines, an unscrupulous manufacturer is able to take advantage of its dealers by making unjustifiable demands, such as requiring needlessly large showrooms, or the purchase of undesired parts or models, under threat of cancellation of the dealership. It was found that many manufacturers were engaging in such practices. See generally, Kessler, Automobile Dealer Franchises: Vertical Integration by Contract, 66 Yale L.J. 1135 (1957). The Federal Act did not seek to convert terminable automobile dealers contracts into nonterminable ones, but was tailored to prevent contractually

[10] *See Volkswagen Interamericana, S.A.* v. *Rohlsen*, 1 Cir., 1966, 360 F.2d 437, *cert. denied* 385 U.S. 919; *Young Motor Co.* v. *Com'r*, 1 Cir., 1960, 281 F.2d 488.

unjustified demands by giving a cause of action for damages resulting from unfair "coercion" and "intimidation." 15 U.S.C. § 1221(e). Absent such improper behavior, any action within the terms of the contract remained permissible, including outright termination without proof of grounds therefor. *Berry Bros. Buick, Inc.* v. *General Motors Corp.*, E.D.Pa., 1966, 257 F.Supp. 542, 546, *aff'd mem.* 3 Cir., 1967, 377 F.2d 552; *cf. Southern Rambler Sales Inc.* v. *American Motors Corp.*, 5 Cir., 1967, 375 F.2d 932, *cert. denied* 389 U.S. 832; 15 U.S.C. §§ 1221, 1222.

By contrast, Law 75 applies to every kind of dealer across the board. As pointed out in the memorandum opinion of the district court in *Felix A. Rodriguez, Inc.* v. *Bristol-Myers Co.*, D.P.R. 2/13/68, many types of dealers carry numerous articles and lines, or can readily convert and absorb the loss of a single manufacturer. Such dealers are not subject to pressure by threats of cancellation. Nor was the Puerto Rico act framed in terms of illegitimate demands—except to say that adherence to the contract terms was itself illegitimate. By labelling the exercise of express contractual rights "unjust" the legislature was not giving a cause of action for contractual abuse; it was re-writing the contract.

Comparing Law 75 with the Federal Act in terms of retrospectivity is, in a sense, merely an intellectual exercise. The parties have cited no case holding even the Federal Act constitutionally retrospective. Non constat, in the light of the differences, that it might properly be so held had the question arisen.[11] Law 75, however, cannot be.

The judgment of the District Court is vacated. Judgment for the defendant.

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[11] We do not reach the question of non-retrospective application of Law 75, as we may wonder how many such dealerships have been established. Since the provisions of the law are non-waivable, manufacturers who are unwilling to accept them will not enter into dealer-

ship contracts at all, and dealers who would prefer to have dealerships omitting such benefits rather than have none, have lost, to that extent, their freedom of contract. It is possible that if the legislature had realized that the law could be applied only prospectively it would not have enacted it. With this matter, however, we are not presently concerned.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

On the same day, March 17, 1970, the following judgment was entered:

JUDGMENT

Entered March 17, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was submitted to the Court.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court with directions to enter judgment for the defendants.

By the Court:

/s/ Dana H. Gallup

Clerk.

Enter:

/s/ Aldrich, Ch.J.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ARTURO FORNARIS, JR.	)	
	)	
Plaintiff, Appellee	)	
	)	
v.	)	
	)	
THE RIDGE TOOL COMPANY, et al	)	
	)	CIVIL NO. 7422
Defendants, Appellants.	)	
	)	
and	)	
	)	
THE COMMONWEALTH OF PUERTO RICO	)	
	)	
Intervenor, Appellee.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Court:

1. Notice is hereby given that Arturo Fornaris, Jr., Plaintiff, Appellee above named, hereby appeals to the Supreme Court of the United States from the judgment opinion entered by this Honorable Court on March 17, 1970.

2. This appeal is taken pursuant to 28 U.S.C. §1254(2). In San Juan, Puerto Rico, this 29th day of April, 1970.

Francisco de Jesus Schuck

[Proof of Service omitted]

Filed in United States
Court of Appeals
for the First Circuit

May 4, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ARTURO FORNARIS, JR.,	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
THE RIDGE TOOL COMPANY AND THE RIDGE TOOL INTERNATIONAL COMPANY, INC.	)	CIVIL NO. 546-66
	)	DAMAGES
	)	
Defendants	)	
	)	
THE COMMONWEALTH OF PUERTO RICO	)	
	)	
Intervenor	)	

MEMORANDUM AND ORDER

On March 12, 1968 this Court entered an order staying proceedings in this action pending determination of an action entitled *United Medical Equipment Corporation vs. S. Blickman, Inc.*, which at that time was pending before the Court of Appeals for the First Circuit, Case Number 6876, and wherein the constitutionality of Law Number 75 of June 24, 1964, as amended (10 L.P.R.A. 278), was being challenged on the same grounds as those raised by the defendants in this case through their motion to dismiss. The matter of the constitutionality of the Dealer's Act was fully briefed and all argument was had before the Court of Appeals, but the case was settled prior to decision.

A similar fate befell the case of *Carmac Chemical Corporation v. Application Engineering Corporation* (Court of Appeals for the First Circuit, Case Number 7177). In this case, the First Circuit, as per Order of Court, August 29, 1968, took the position that it would appreciate an opportunity to consider the views of at least the Superior Court of Puerto Rico on the constitutionality of the Dealer's Act. Accordingly, it neither allowed nor denied the interlocutory appeal and stated that upon receipt of any decision and opinion from the Superior Court of Puerto Rico, and upon a joint stipulation or a deposition or other showing of the terms, conditions and surrounding circumstances, the Court would again consider the application for leave to appeal in the *Carmac* case. Once again the parties settled the case and there is now no case pending before the United States Court of Appeals which raises the constitutionality of the Dealer's Act.

The matter of the constitutionality of the Dealer's Act has now been passed upon by the Superior Court of the Commonwealth of Puerto Rico in the case of *Construction Machinery and Supplies Corporation v. Construction Machinery Co.*, Civil Number 67-3549. A translation of this case is set out as Exhibit A to this order, and made to form a part hereof by reference.

A motion for reconsideration of the Superior Court Order was denied on March 11, 1969 by said Tribunal.

In view of the foregoing developments, this Court ordered that this case be set for some disposition and set a hearing thereon for June 13, 1969. By motion dated June 9, 1969, attorneys for the plaintiff requested that on the basis of the decision rendered by the Superior Court of Puerto Rico in the case of *Construction Machinery and Supplies Corp. v. Construction Machinery Co.*, *supra*, and on the basis of this Court's prior decision upholding the constitutionality of the Dealer's Act of Puerto Rico we order the dismissal of defendant's

motion to dismiss and order the defendants to file their answer to the complaint filed in this case.

We agree with plaintiff that the motion to dismiss should be denied on the basis of our prior decision in this area [*Ruiz v. Economics Laboratory, Inc.*, 274 F. supp. 14 (1967)]. This Court is of the opinion that the order of dismissal of the constitutional defense raised by the defendants involves a controlling question of law as to which there is substantial ground for difference of opinion in this jurisdiction and that an immediate appeal from this order may materially advance the ultimate termination of this litigation and of many others presently pending in this Tribunal. In conformity with 28 U.S.C.A. §1292(b) and inasmuch as a rapid adjudication of the constitutionality of the Dealer's Act is not only in the best interests of the parties to this action, but is also in the furtherance of justice, it is hereby

ORDERED

1. Defendant's motion to dismiss on constitutional grounds is denied (*Ruiz v. Economics Laboratory, Inc.*, 274 F. Supp. 14 (1967) *Construction Machinery and Supplies Corp. v. Construction Machinery Co.*, Civil Number 67-3349, Superior Court of Puerto Rico, San Juan Part).

2. This Court is of the opinion that this order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly, this Court hereby so states as required by Section 1292(b) of Title 28 U.S.C.A.

3. All further proceedings in this case are stayed until further order of this Court.

San Juan, Puerto Rico, this 8th day of August 1969

/s/ Hiram R. Cancio
HIRAM R. CANCIO
CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN PART

CONSTRUCTION MACHINERY & SUPPLIES CORPORATION

Plaintiff,

vs.

CONSTRUCTION MACHINERY CO.

Defendant

Re: DAMAGES

COMMONWEALTH OF PUERTO RICO

Intervenor

OPINION

The matter before the court is a special defense filed by defendant in this case on May 13, 1968 in which there is alleged the unconstitutionality of Law § 75 of 1964, as amended.[1]

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[1] The circumstances that led to the intervention by the Legislature of Puerto Rico are amply set forth in 34 Rev. Jur. de la U.P.R. p. 497. The following appears there:

> "Law No. 75 of June 24, 1964 is of great importance for contractual relationships between principals and distributors in Puerto Rico. We shall study two aspects of it. First, the manner in which said contracts are affected by the law. Second, the constitutional issues raised by the same. This second part of the study will be carried out by means of a comparative analysis of other similar laws that are in effect in different jurisdictions of the United States.

(Footnote 1 continued on page 50.)

After having studied the memoranda of the parties, as well as the oral argument, we may pass on to consider the allegations.

Footnote 1 continued:

Similarly, the jurisprudence which has arisen in connection with these statutes will form a part of our analysis.

The social ill that this piece of legislation seeks to correct is based upon the fact that a great number of distributors based in Puerto Rico have been eliminated as factory representatives. This tendency caused the voices of the Chamber of Commerce of Puerto Rico and of the individual distributors to be heard in protest against the existing situation. Said tendency is characterized by two types of situations: principals or grantors that arbitrarily cancel the distribution contracts of businessmen established in Puerto Rico; and the factories that decide to open their own sales offices or branches. The distributors faced these problems espousing several arguments. This group maintains that the development of a market for the represented products requires great sums of money. That once the products are on the market, the factories, not withstanding the effort and the capital invested, cancel the contracts and establish themselves here without providing any indemnity whatever. It is pointed out that the system by means of which the manufacturers establish sales offices or branches creates an instability that impedes the strengthening of the field of local capital investment. It is also said that when branches or sales offices are established, these export a large part of the profits earned in Puerto Rico.

Some of the established branches are classified as marginal branches. These are the sales offices located in markets that are small when compared to other branches in the United States. They are the first to be closed in time of emergency, which would force Puerto Rico to recur directly to the northamerican market to obtain indispensable items, especially in the field of industry. This class also incurs greater general expenses relative to sales and the product which would result in a price increase and a reduction in services.

Local distribution serves as an incentive to those persons who won't have their own business. A manager of a branch cannot become interested in the problems, ambitions and needs of our community. The distributors claim that the manager of a branch has as his

(Footnote 1 continued on page 51.)

1. The defendant alleges that Act No. 75 of 1964 impairs the obligations of contracts existing at the time of its approval.

Footnote 1 continued:

purpose the securing of a promotion to be sent to another country or to the home office as an executive and, for that reason, is not interested in the well-being of the Puerto Rico economy. The persons in charge of the sales office do not fully know the motivations or factors that motivate the decisions that must be put into effect, inasmuch as these are made by the Board of Directors at the home company. Said decisions may very well result in a detriment to the Puerto Rico market due to the fact that standards and methods used in the northamerican nation are not necessarily applicable to our market. The distributor established in Puerto Rico by his very nature and experience is more familiar with the country's market. We can say that he knows the psychology of the consumer. As a result this singular position allows the person to adequately determine the preferences of the consumer in terms of the type of product desired and the amounts that may be consumed, thus maintaining a beneficial balance for the economic stability of our community.

Those who are opposed to a system of distribution of products and services through exclusive distributors claim that it is an unnecessary and expensive middle step that only contributes to an increase in the costs of distribution. The opposing side argues that it is an indispensable factor for the marketing system. This is based upon the following: Due to our insular condition to the fact that our market is separated from the principle sources of supply by an enormous stretch of sea, to our geographical smallness and lack of natural resources and because potential sales and business volume in our island is relatively small, to the manufacturer it would normally be uneconomic to eliminate the exclusive agent or distributor and establish its own branch for sales, or to sell to consumers from its point of origin or to local wholesalers and retailers. The exclusive agent or distributor is a functional intermediary that with the exception of certain isolated cases, may not be eliminated or cut back without causing injury to the efficiency and costs of our distribution system, for they render important services in an atmosphere of competition to the producer and the consumer in a manner more efficient and economic than the very manufacturers."

(Footnote 1 continued on page 52.)

In support of this allegation the defendant cites the provisions of Article 1207 of the Civil Code and the first article, tenth section of the Constitution of the United States of America and the second article, seventh section of the Constitution of the Commonwealth of Puerto Rico.

The provisions cited above have not been violated by this Law of the Legislature of Puerto Rico. It is a principle recognized by the courts of Puerto Rico and of the United States of America that this right of freedom of contract is not one without limit of any kind. The

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Footnote 1 continued:

The circumstances set forth above led the legislature to act. It was forced to resolve the problem put to it by a pressure group: the need to stop the principals, or at least to seek indemnification for the distributors. It was the practice to include a clause, in which it was provided that either of the parties by means of 30, 60, or 90 days notice could cancel the existing relationship. The principal, making use of its bargaining power, managed to include in the contract this and other clauses favorable to it.

In order to remedy this situation, the Legislative Assembly of Puerto Rico, invoking the police power of the State, approved the law now before us for the purpose of regulating the termination of distribution contracts and a refusal to renew the same. The statute expressly provides that no principal or grantor may unilaterally terminate a distribution contract or refuse to renew the same without just cause, notwithstanding any agreement to the contrary.

If the principal or grantor terminates the contractual relationship, without just cause, it must indemnify the distributor. The rights granted by the law are of a public nature, and therefore not waivable. All actions based upon the law prescribe in three years reckoned from the date of the definitive termination."

In light of the foregoing examination it is evident that the problems and needs of Puerto Rico are in large measure different from those of the United States of America and the existing relationship between the two requires a more equitable and special consideration in order to arrive at the conclusions of this opinion. We can not forget that Puerto Rico is a small island (3,500 square miles), tropical, with few natural resources, depending, for this reason, greatly upon business".

same is conditioned by the police power of the state. Article 1207 of our Civil Code contemplates this when it provides that:

> "The contracting parties may make the agreements and establish the clauses and conditions which they may deem advisable, provided they are not in contravention of law, morals of public order". (31 LPRA 3372)

In *Manigault v. Spring*, 199 U.S. 473 (1905) it was noted that:

> "This power . . . is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals".

Reference may also be made to *Sierra v. San Miguel*, 1949, 70 P.R.R. 573, in which the Honorable Supreme Court of Puerto Rico referring to the same question notes that "no rule is more firmly embedded in our constitutional law than this doctrine". See further, *Veil v. Sixth Ward Building*, 310 U.S. 32; *Anderson v. Brand*, 303 U.S. 95; *City of El Paso v. Simmons*, 379 U.S. 497.

Law No. 75 was created to remedy an existing "grave situation" that would still exist if it were not for the promulgation of said law. See page 1531 of the Record of Meetings of the Legislative Assembly of Puerto Rico of 1964 where it is said:

> "Your Committee on Industry and Commerce has considered the substitute to S.B. 673 and has the honor of proposing that it be approved without amendment.
>
> The problem created in the system of distribution in Puerto Rico by the intemperate action of foreign and domestic business concerns that, without just cause, cancel their

relationships with their distributors and agents in Puerto Rico, as soon as those have created a favorable market for their products, frustrating the legitimate expectations and interests of those who have so efficiently met their responsibilities, has recently worsened.

Normally, the agency or distribution contract is drafted by the manufacturer with clauses favorable to it, and a provision to the effect that the relationship may be terminated by either of the parties, by means of prior notice of sixty or ninety days. The distributor or agent efficiently devotes himself to opening the market for the represented product, and, when he begins to derive benefits from the operation, once the market is established, the manufacturer realizes that it would be economically favorable to establish its own sales office or its own branch, and in an unjust manner, without equitable compensation for the efforts expended by the distributor or agent, cancels the relationship. In other cases, the manufacturer finds another person who, the business being established, is willing to distribute the product for less compensation, because he doesn't have to make the initial investment, and is not subject to the risks of the prior distributor or agent.

The traditional provisions which regulate contracts between private parties have shown themselves to be incapable of protecting the legitimate rights of the distributor or agent, and for this reason it has become necessary to legislate to regulate this relationship and guarantee that the manufacturers will act in good faith, equitably, in a non-arbitrary manner, and to preserve for the distributor or agent the legitimate rights and expectations

inherent in the relationship. Moreover, this will result in greater stability for the distribution relationship.

This is the grave situation that is sought to be remedied by the approval of this bill. The Department of Commerce of the Commonwealth of Puerto Rico, the Chamber of Commerce of San Juan, and the Agency for Industrial Development regard with accord and heartily endorse the protection and stability that would be given to the relationships between manufacturers and their distributors if this bill should be approved.

The Committee, unanimously, agreed to recommend the passage of this bill".

The defendant has noted that in said legislation the word "emergency" has not been used to justify the existence of said legislation. The expression "grave situation" within our language and culture and the interpretation which this Court makes of the legislative intent has a meaning similar to the English term "emergency"; assuming, but without deciding, that the appearance of this term is an indispensable requirement. The Spanish term "emergencia" as a translation of the English term "emergency" is an anglicism.[2]

In the case of *Willy's Motor v. Northwestern Kaiser–Willy's, Inc., 142 F. Supp. 469 (D.C.–1956)* there was contested the constitutionality of a Minnesota statute which contained greater requirements as to the relationship between manufacturers and distributors and at the same time covered a more restricted area than that covered by Law No. 75. The Court, in sustaining the constitutionality of the Minnesota statute, noted that

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[2]The Dictionary of the Royal Academy, eighteenth edition, defines the term "emergencia" as the act or result of emerging, occurrence, a supervening accident.

legislation enacted with a public purpose was not subject to attack under the Contracts Clause.

Law No. 75 has a public purpose, as can be clearly seen from its legislative history as well as from its statement of motives,[3] for this reason, we are of the opinion that the law does not suffer from the constitutional vice alleged and discussed above.

II. The defendant alleges as the second ground for the unconstitutionality of Law No. 75 that the Law violates the Due Process Clause as to manufacturers and that it is vague and imprecise as to its scope and definition of the term "just cause".

The standard to be used must be the reasonableness of the legislation. If the measure which we are considering is justified by social, economic, health, or general welfare considerations, and it is reasonable the statute must be considered to be invulnerable to attacks of this sort.

In the case of *Blenke Brothers v. Ford Motor Co.*, 203 F. Supp. 670 (1962) the Court concluded that "the fact that Congress. . gave the dealer a remedy. . without giving the same remedy to the manufacturer, is not violative of the due process clause. . .". See to the same effect the case of *Kuhl Motors Co. v. Ford Motor Co.* 71 N.W. 2d 420.

---

3 "Statement of Motives"

The Commonwealth of Puerto Rico can not remain indifferent to the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, concessionaries, or agents, as soon as these have created a favorable market and without taking into account their legitimate interests.

The Legislative Assembly of Puerto Rico declares that the reasonable stability in the dealer's relationship in Puerto Rico is vital to the general economy of the country, to the public interest and to the general welfare, and in the exercise of its police power, it deems it necessary to regulate, in as far as pertinent, the field of said relationship, so as to avoid the abuse caused by certain practices".

The defendant alleges that Law No. 75 in its definition of just cause is unreasonable, arbitrary and capricious, vague and imprecise. Said definition is not limited to its literal content. It constitutes a guide to the Court so that it may decide in the light of the facts of each particular case whether or not there existed just cause. This concept of just cause just like the concept of the reasonable man and the good head of a family is not a new concept in our law.

In the cases of *P.R. Cap. S. Tire Sales v. District Court*, 1948, 68 P.R.R. 370; *Aviles v. District Court*, 1948, 69 P.R.R. 106; *Blanes v. District Court*, 1948, 69 P.R.R. 106; *Mercedes Bus Line, Inc. v. District Court*, 1949, 70 P.R.R. 656, our Supreme Court considered the concept of "just cause" in accordance with the facts of each case brought before its consideration. In each of these cases it can be appreciated how wide this concept of just cause is; as well as its usefulness in our system. The use of this concept in various laws is due to the fact that the legislature cannot foresee every possible fact situation when it drafts a law, leaving this function to the courts who must decide in accordance with the particular facts of each case. This Court cannot understand that the legislator has imposed as the only reason justifying a cancellation of the relationships the reasons which make up the definition of just cause.

This concept of just cause, in its turn, should further be supplemented, when a case may merit it, with statutory precepts drawn from other laws of the State. Such would be the case of a manufacturer who for economic reasons cannot continue to sell its products in our market. In a situation like this one, this Court is of the opinion that it would be necessary to go beyond the law and make applicable the provisions that are relative to the impossibility of performance contemplated by our Civil Code, in Art. 1138 (31 LPRA 3193). See *Rodriguez v. Municipality*, 75 P.R.R. 449, where the Supreme Court of Puerto Rico says that:

"The impossible performance is produced when, having examined the circumstances on which a contract is signed and the circumstances on which it should be subsequently performed, it appears that its subsequent performance is not possible because of the supervening circumstances which did not exist at the time of contracting the obligation".

Summarizing, this concept of just cause must be interpreted case by case and always depending upon the particular facts of each one.[4] Obviously our own juridical system provides for cases in which compliance becomes impossible, and for this reason it is not correct to suppose that Law No. 75 of 1964 is unjust or oppressive in its terms.

There is nothing in the law that might be interpreted as indicating that the Legislature of Puerto Rico is discriminating against firms operating in interstate commerce. The law applies both to local firms and continental ones doing business in Puerto Rico. The present legislation is clearly within the police power which the Commonwealth of Puerto Rico possesses and within the clear intention of the Legislature of Puerto Rico to protect its citizens and businessmen.

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[4] Recently the Federal District Court for Puerto Rico, by the Hon. Judge Fernández Badillo expressed the same thought in the case of Schering Transamerican Corporation vs. Wallace Torres Canet vs. Sutton Cosmetics, et. al., Civil No. 542-66 in noting in its opinion of September 30, 1968 the following:

"Defendant does not claim that Sutton Cosmetics could not have whatever arrangement it had with him. Certainly when Sutton Cosmetics went out of business, that was ample 'just cause' to terminate whatever relationship they had".

"Nor does it preclude a state from giving needful protection to its citizens in the Course of their contacts with business conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration".

It is worthy of note that in our commercial relations with the United States, Puerto Rico has received special treatment from the United States. Examples of this, among others, are the tariff laws dealing with sugar, coffee and rum exported from Puerto Rico. These and other similar laws, are founded upon the geographic and economic conditions of Puerto Rico and the lack of adequate natural resources, all of which has justified the special treatment as regards the other states of the Union.

IV. Defendant alleges that Law No. 75 violates the equal protection clause. The defendant further argues in its brief that the law in question operates for the sole and exclusive benefit of those distributors in existence at the time of its approval and that the manufacturers may not appoint additional distributors.

The equal protection clause does not imply that at any given moment the Legislature of a country may not establish a counterbalance in favor of a disadvantaged class.

In the case of *Kuhl Motor Co. v. Ford Motor Co. (supra)*, the following was noted:

> "The fact that the persons to be benefited by this regulatory measure are confined to one class of our citizens, auto dealers, does not militate against the same being a legitimate exercise of the police power".

There exists in Puerto Rico and the United States a great quantity of legislation which is directed to the benefit a particular class of individuals or persons. To contend that this may not be done is to bind the arms of the State in its mission to make all citizens equal in law.

There is nothing in this law that would lead this Court to think that new distributors may not be appointed inasmuch as the statute does not prohibit such action.

What the law regulates is the termination of the existing relationship: or directly or indirectly executing an act which impairs the established relationship: or a refusal to renew said contract upon its normal expiration. (10 L.P.R.A. 278a).

The case before us does not involve the appointment of an additional distributor. It deals with the termination of a distribution contract. At the proper moment we will decide whether there existed or not just cause. There may be circumstances in which the appointment of a new distributor constitutes an impairment of the established relationship, but courts should not deal with hypothetical situations. This Court is of the opinion that if the manufacturer or principal names a new distributor and there is no impairment of the existing relationships between it and the original distributor, said distributor is totally lacking a cause of action under this law. *We have already said that Law No. 75 is one which should be interpreted case by case and that only after the presentation of the whole evidence will the Court be in a position to determine whether there was an impairment of the existing relationship, or if there was a unjustified refusal to renew a contract or if a contract was terminated without just cause.*

The defendant alleges that Law No. 75 creates a monopoly in favor of the distributor. We do not see the logic of this observation. When an act, or series of acts in a particular case result in a monopoly or monopolistic practices prohibited by law, we will decide that problem in the light of the particular case. Neither the legislative history of Law No. 75, nor Law No. 77 of June 25, 1964, known as the monopoly law, provide a basis for this assertion. These laws were enacted contemporaneously so the legislators were aware of the contents and language of each when they were approved.

In connection with the damages contemplated by Section 278 b of the law (Title 10 L.P.R.A.), we are of the opinion that the same does not limit the power of

the Court to indemnify a distributor upon the basis of the factors set forth in the said section.

For the reasons set forth, the Court concludes that Law No. 75 of 1964, as subsequently amended meets the constitutional requirements. The special defense pleaded by the defendant is therefore denied.

Let service be made.

Given at San Juan, Puerto Rico, this 23rd of December, 1968.

(s) Hector Ruiz Somohano
Superior Court Judge

PUERTO RICAN DEALERS' CONTRACT ACT

10 L. P. R. A. § 278, et seq.

§ 278. Definitions

For the purposes of this chapter, the following terms shall have the meanings expressed below, save when the context clearly indicates otherwise:

(a) dealer: person actually interested in a dealer's contract because of his having effectively in his charge in Puerto Rico the distribution, agency, concession or representation of a given merchandise or service;

(b) dealer's contract: relationship established between a dealer and a principal or grantor whereby and irrespectively of the manner in which the parties may call, characterize or execute such relationship, the former actually and effectively takes charge of the distribution of a merchandise, or of the rendering of a service, by concession or franchise, on the market of Puerto Rico.

(c) principal or grantor: person who executes a dealer's contract with a dealer;

(d) just cause: nonperformance of any of the essential obligations of the dealer's contract, on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service.—June 24, 1964, No. 75, p. 231, § 1, eff. June 24, 1964; amended June 23, 1966, No. 105, p. 331, § 2, eff. June 23, 1966.

1966—Subsection (a): The 1966 Act amended definition of dealer so as to include not only the person so designated but also any person actually interested in a dealer's contract who acts as such.

Subsection (b): The 1966 Act included in definition of dealer's contract any contract whereby one of the parties actually acts as such "irrespectively of the manner in which the parties may call".

§ 278a. Termination of relationship

Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may directly or indirectly perform any act detrimental to the established relationship or refuse to renew said contract on its normal expiration, except for just cause.—June 24, 1964, No. 75, p. 231, § 2, eff.

June 24, 1964; amended June 23, 1966, No. 105, p. 331, § 2, eff. June 23, 1966.

1966 The 1966 Act added prohibition for principal or grantor to "directly or indirectly perform any act detrimental to the established relationship".

§ 278b. Damages

If no just cause exists for the termination of the dealer's contract for detriment to the established relationship, or for the refusal to renew same, the principal shall have executed a tortious act against the dealer and shall indemnify it to the extent of the damages caused him, the amount of such indemnity to be fixed on the basis of the following factors:

(a) the actual value of the amount expended by the dealer in the acquisition and fitting of premises, equipment, installations, furniture and utensils, to the extent that these are not easily and reasonably useful to any other activity in which the dealer is normally engaged;

(b) the cost of the goods, parts, pieces, accessories and utensils that the dealer may have in stock, and from whose sale or exploitation he is unable to benefit;

(c) the good will of the business, or such part thereof attributable to the distribution of the merchandise or to the rendering of the pertinent services, said good will to be determined by taking into consideration the following factors:

(1) number of years the dealer has had charge of the distribution;

(2) actual volume of the distribution of the merchandise or the rendering of the pertinent services and the proportion it represents in the dealer's business;

(3) proportion of the Puerto Rican market said volume represents;

(4) any other factor that may help establish equitably the amount of said good will;

(d) the amount of the profit obtained in the distribution of the merchandise or in the rendering of the services, as the case may be, during the last five years, or if less than five, five times the average of the annual profit obtained during the last years, whatever they may be.—June 24, 1964, No. 75, p. 231, § 3, eff. June 24, 1964;

amended June 28, 1965, No. 104, p. 276, eff. June 28, 1965; June 23, 1966, No. 105, p. 331, § 2, eff. June 23, 1966.

1966—The 1966 Act added reference to detriment to established relationship.

1965—The 1965 Act amended first paragraph to provide that if no just cause exists for termination of contract, principal will have committed a tortious act.

§ 278c. Waiver of provisions

The provisions of this chapter are of a public order and therefore the rights determined by such provisions cannot be waived. This chapter being of a remedial character, should, for the most effective protection of such rights, be liberally interpreted; in the adjudgment of the claims that may arise hereunder, the courts of justice shall recognize the right in favor of whom may, effectively, have at his charge the distribution of activities, notwithstanding the corporate or contractual structures or mechanisms that the principal or grantor may have created or imposed to conceal the real nature of the relationship established.—June 24, 1964, No. 75, p. 231, § 4, eff. June 24, 1964; amended June 23, 1966, No. 105, p. 331, § 2, eff. June 23, 1966.

1966—The 1966 Act added second sentence relating to liberal interpretation.

§ 278d. Prescription of actions

Every action arising from this chapter shall prescribe in three years reckoning from the date of the definite termination of the dealer's contract, or of the performing of the detrimental acts, as the case may be.—June 24, 1964, No. 75, p. 231, § 5, eff. June 24, 1964; amended June 23, 1966, No. 105, p. 331, § 2, eff. June 23, 1966.

1966—The 1966 Act added words "or of the performing of the detrimental acts, as the case may be".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 543

THE COMMONWEALTH OF PUERTO RICO, *Appellant*,

v.

THE RIDGE TOOL CO.,

THE RIDGE TOOL INTERNATIONAL CO., INC.,

and

ARTURO FORNARIS, JR., *Appellees*.

On Appeal From the United States Court of Appeals for the First Circuit

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

THE COMMONWEALTH OF PUERTO RICO, *Appellant*,

v.

THE RIDGE TOOL CO.,

THE RIDGE TOOL INTERNATIONAL CO., INC.,

and

ARTURO FORNARIS, JR., *Appellees*.

On Appeal From the United States Court of Appeals for the First Circuit

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States Court of Appeals for the First Circuit entered on March 17, 1970 holding a statute of the Commonwealth of Puerto Rico unconstitutional and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit, attached hereto as Appendix A, is reported at 423 F.2d 563 (1970).

The unreported Memorandum and Order of the United States District Court for the District of Puerto Rico is attached as Appendix B.

JURISDICTION

This action was commenced by Arturo Fornaris, Jr. against The Ridge Tool Co. and its subsidiary, The Ridge Tool International Co., Inc., in the Superior Court of the Commonwealth of Puerto Rico under Law 75 of the Laws of the Commonwealth of Puerto Rico known as the Dealers' Contracts Law. The case was subsequently removed to the United States District Court for the District of Puerto Rico, pursuant to 28 U.S.C. §§ 1441 *et seq.* The Commonwealth of Puerto Rico was an intervenor in the proceeding.

In the District Court the defendant moved to dismiss on the ground that Law 75 was unconstitutional. This motion was denied by order of the District Court on August 8, 1969. In denying the motion, the District Judge certified, pursuant to 28 U.S.C. § 1292(b), that his order involved a controlling question of law as to which there was substantial ground for difference of opinion, thus making possible an immediate appeal from the otherwise interlocutory order.

On appeal, the United States Court of Appeals for the First Circuit reversed, holding Law 75 invalid as repugnant to the due process clause of either the fifth or fourteenth amendment to the United States Constitution. The opinion was rendered March 17, 1970,

and judgment was entered that same day. A notice of appeals to this Court, attached as Appendix C, was filed on behalf of the Intervenor, the Commonwealth of Puerto Rico, on May 26, 1970.

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U.S.C. § 1254(2):

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, . . ."

The Commonwealth of Puerto Rico Has Standing

As an intervenor below, the Commonwealth of Puerto Rico is a party to this proceeding and may thus seek review of the judgment in its own right. 28 U.S.C. § 1254(2); cf., *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945).

The Statute in Question Is a "State Statute"

The Commonwealth of Puerto Rico is not a state, but its laws should be treated as state laws for the purpose of an appeal to this Court.

Rule 61 of the Supreme Court of the United States provides as follows:

> "The term 'state court' when used in these rules includes the Supreme Court of the Commonwealth of Puerto Rico, *and references in these rules to the law and statutes of a state include the law and statutes of the Commonwealth of Puerto Rico.*" [Emphasis added.]

In addition, decisions of the Supreme Court of the Commonwealth of Puerto Rico are treated exactly the

same as those of the highest courts of the several states regarding review in this Court by appeal or certiorari. Compare, 28 U.S.C. § 1257 with 28 U.S.C. § 1258.

Furthermore, a number of cases have recognized Puerto Rico to be a state within the meaning of certain statutory provisions. In the case of *Mora* v. *Mejias*, 206 F.2d 377 (1st Cir., 1953), the Court of Appeals for the First Circuit stated at p. 386 that the "word 'State' may in the context of a particular act of Congress have a broader connotation than a state in the federal Union." The court continued by saying, at p. 387 that "Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word." Cf., *Americana of Puerto Rico, Inc.* v. *Kaplus*, 368 F.2d 431 (3rd Cir. 1966); *Detres* v. *Lyons Bldg. Corp.*, 234 F.2d 596 (7th Cir. 1956).

A Puerto Rican statute is, therefore, to be considered a "state statute" for the purpose of an appeal to this Court.[1]

QUESTIONS PRESENTED

1. Whether the Dealers' Contracts Law, Law 75 of the Laws of the Commonwealth of Puerto Rico, as interpreted by the Court of Appeals, is invalid as repugnant to the due process clause of either the fifth or fourteenth amendment to the United States Constitution.

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[1] In the event an appeal is deemed improper, however, the Commonwealth of Puerto Rico asks specifically that this document be treated as a petition for certiorari. *El Paso* v. *Simmons*, 379 U.S. 497 (1965).

2. Whether the Court of Appeals erred in holding Law 75 unconstitutional in the absence of any factual record or of a definitive interpretation of the statute by the Supreme Court of Puerto Rico.

STATUTE INVOLVED

The Dealers' Contracts Law in effect at the time this case arose is set forth as Appendix D hereto. Law 75, 1964 Laws of Puerto Rico, as amended by Law 104, 1965 Laws of Puerto Rico.

STATEMENT

This case arises because of the unusual significance to the Puerto Rican economy of dealerships and distributorships in the Commonwealth, the Puerto Rican legislature's determination of a need to legislate with respect thereto, and the application of such legislation to a specific manufacturer-dealer relationship.

The economy of the Commonwealth of Puerto Rico is well known to be behind that of the mainland United States. The per capita income of Puerto Rico ($1,230 per annum) is substantially below that of the State of Mississippi ($2,057 per annum) which is the lowest of the fifty states. In such a context, it is obvious that termination of a number of dealerships, of which there are many in Puerto Rico, can have a relatively much greater impact than a similar number of terminations in a state of comparable population.[2]

Because Puerto Rico has relatively few natural resources or indigenous industries, the Commonwealth is forced to rely heavily upon mainland United States

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[2] Puerto Rico with 2,741,800 people has a greater population than 25 of the 50 states, falling between the 25th State, Iowa (2,771,000), and the 26th State, South Carolina (2,587,000). The New York Times Encyclopedic Almanac 1970.

and foreign manufacturing concerns for consumer goods and other products. The great distance between Puerto Rico and the mainland and the significant difference in cultures virtually require that mainland products be introduced to the people of Puerto Rico, initially at least, by local businessmen. Distributorships and dealerships accordingly make up a large proportion of those Puerto Ricans in business for themselves. As relatively very small entrepreneurs, however, the Puerto Rican distributors and dealers are at a considerable disadvantage vis-a-vis the mainland manufacturers they serve.

This disparity in economic and bargaining power led inevitably to abuses of the relationship. Manufacturing concerns were creating dealerships at the local level to introduce their products to the people of Puerto Rico, but after a favorable market had been developed by the dealer, the dealership would be abruptly terminated. The manufacturer would then either assume distribution itself—capitalizing on the already established market—or find other dealers willing to operate on a lower commission because of the lack of risk involved. The dealer's investment in capital, time, and effort was completely extinguished and no indemnity or reparation was made—nor did any contract so provide. Such was the weakness of the dealer's position. Eventually, the Puerto Rican legislature moved to correct the injustice by enacting Law 75.

The Record of Meetings of the Legislative Assembly of Puerto Rico of 1964, p. 1531, gives this statement of the background of the law:

> "Your Committee on Industry and Commerce has considered the substitute to S.B. 673 and has

the honor of proposing that it be approved without amendment.

"The problem created in the system of distribution in Puerto Rico by the intemperate action of foreign and domestic business concerns that, without just cause, cancel their relationships with their distributors and agents in Puerto Rico, as soon as those have created a favorable market for their products, frustrating the legitimate expectations and interests of those who have so efficiently met their responsibilities, has recently worsened.

"Normally, the agency or distribution contract is drafted by the manufacturer with clauses favorable to it, and a provision to the effect that the relationship may be terminated by either of the parties, by means of prior notice of sixty or ninety days. The distributor or agent efficiently devotes himself to opening the market for the represented product, and, when he begins to derive benefits from the operation, once the market is established, the manufacturer realizes that it would be economically favorable to establish its own sales office or its own branch, and in an unjust manner, without equitable compensation for the efforts expended by the distributor or agent, cancels the relationship. In other cases, the manufacturer finds another person who, the business being established, is willing to distribute the product for less compensation, because he doesn't have to make the initial investment, and is not subject to the risks of the prior distributor or agent.

"The traditional provisions which regulate contracts between private parties have shown themselves to be incapable of protecting the legitimate rights of the distributor or agent, and for this reason it has become necessary to legislate to regulate this relationship and guarantee that the manufacturers will act in good faith, equitably, in a

non-arbitrary manner, and to preserve for the distributor or agent the legitimate rights and expectations inherent in the relationship. Moreover, this will result in greater stability for the distribution relationship.

"This is the grave situation that is sought to be remedied by the approval of this bill. The Department of Commerce of the Commonwealth of Puerto Rico, the Chamber of Commerce of San Juán, and the Agency for Industrial Development regard with accord and heartily endorse the protection and stability that would be given to the relationships between manufacturers and their distributors if this bill should be approved.

"The Committee, unanimously, agreed to recommend the passage of this bill."

Further, the Statement of Motives for Law 75 when enacted in 1964 further highlights the problem sought to be corrected:

"The Commonwealth of Puerto Rico cannot remain indifferent to the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, concessionaries, or agents, as soon as these have created a favorable market and without taking into account their legitimate interests.

"The Legislative Assembly of Puerto Rico declares that the reasonable stability in the dealer's relationship in Puerto Rico is vital to the general economy of the country, to the public interest and to the general welfare, and in the exercise of its police power, it deems it necessary to regulate, in as far as pertinent, the field of said relationship, so as to avoid the abuse caused by certain practices."

In the case of the plaintiff below, Arturo Fornaris, Jr., The Ridge Tool Co., subsequent to the enactment

of Law 75, cancelled his 29-year dealership and assumed direct distribution of its products in Puerto Rico. No provision was made to compensate Fornaris for his investment in inventory, facilities or good will, and Fornaris, helpless in the face of this action, turned to the courts for relief.

THE QUESTIONS ARE SUBSTANTIAL

The issues in this appeal go to the very heart of the constitutional authority of the Commonwealth of Puerto Rico to regulate economic activity within its borders. Furthermore, the decision of the Court of Appeals contravenes the long-standing policy of permitting the states to legislate in this area and wholly disregards the inherent right of the Commonwealth to define a problem of concern to its people and to legislate accordingly. Finally, the Court of Appeals struck down the statute in question without any factual record and in the absence of any definitive interpretation of the statute by the Puerto Rican courts.

1. The Court of Appeals Exceeded Its Authority in Denying the Commonwealth of Puerto Rico the Right To Control Business Relationships Within Extremely Broad Limits

The day has passed when state economic regulatory legislation may be struck down on the ground that the premises underlying such legislation are contrary to or repugnant to the views of the federal courts. In holding Law 75 unconstitutional, the Court of Appeals ignored principles set forth by this Court in such cases as *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421 (1952):

> "Our recent decisions make plain that we do not sit as a superlegislature to weight the wisdom of legislation nor to decide whether the policy which

it expresses offends the public welfare. The legislative power has limits. . . . But the *state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.*" (at p. 423) [Emphasis added.]

As recently as 1963 in the case of *Ferguson* v. *Skrupa*, 372 U.S. 726, this Court in reversing the decision of the three-judge court invalidating a Kansas statute, said as follows:

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, . . . outlawing 'yellow dog' contracts, . . . setting minimum wages for women, . . . and fixing the weight of loaves of bread. . . . This intrusion by the judiciary into the *realm of legislative value judgments* was strongly objected to at the time. . . .

* * * *

"The doctrine. . . —that due process authorizes courts to hold laws unconstitutional when they believed the legislature has acted unwisely—has long been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs

for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' *Legislative bodies have broad scope to experiment with economic problems,* and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'

* * * *

"We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas." (at pp. 729-732) [Emphasis added.]

The Puerto Rican legislature determined that an evil affecting its citizens and economy existed. Franchised and other dealers who had built up good will through years of effort in the sale and service of par-

ticular products were having their franchises and dealerships terminated arbitrarily and without "just cause" to the detriment of the local economy. The legislature made a value judgment and defined an evil. It devised a technique to place the manufacturer and dealer on more equal ground. The result was Law 75.

The Court of Appeals, however, did not like Law 75 and allowed its distaste for the law's provisions—abundantly evidenced by numerous remarks in its opinion—to obscure its judgment and lead it into serious error. The court improperly, and contrary to the principles established by this Court, intruded into the "realm of legislative value judgments" and denied the Puerto Rican legislature the right to control business practices within "extremely broad limits" and "experiment with new techniques" in the area of business regulation. *Day-Brite Lighting, Inc.* v. *Missouri, supra; Ferguson* v. *Skrupa, supra.*

2. The Court of Appeals Failed To Follow This Court's Criteria for Determining the Constitutionality of Retrospective Legislation

The Court of Appeals held the Dealers' Contracts Law of Puerto Rico unconstitutional as retrospectively applied. This alleged restrospectivity is questionable, however, in that the law relates not to conduct prior to enactment but rather to subsequent conduct within a preexisting relationship. But even if the law does operate retrospectively, the Court of Appeals nevertheless failed properly to apply this Court's well-established precepts governing consideration of retrospective enactments. The Court of Appeals, apparently out of its dislike of the statute, accorded those precepts only summary consideration. It noted

that "only minor infringement of established contractual rights may be effected without just compensation" (423 F.2d at 567) and then went on to find that the changes effected by the law were not minor (at 567-568). A little more was said about retrospectivity, nothing significant, but Law 75 was invalidated. Decisions of this Court require that infinitely more complex criteria be considered in evaluating such legislation.

First and foremost, the constitutional validity of any retrospective legislation must be viewed in the light of the conditions which led to its passage. See, *e.g., El Paso* v. *Simmons,* 379 U.S. 497 (1965). More specifically, some examination must be made of the interest of the legislative body, and hence the public, in the passage of such a law, and legislative findings must be accorded great weight. The courts are obliged to ascertain whether any discernible public purpose is being served. As the Court said in *East New York Savings Bank* v. *Hahn,* 326 U.S. 230, 232 (1945):

> "The Blaisdell Case and decisions rendered since . . . yield this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State 'to safeguard the vital interests of its people,' . . . is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment."

See also, *Veix* v. *Sixth Ward Building & Loan Ass'n,* 310 U.S. 32 (1940); *Treigle* v. *Acme Homestead Ass'n,* 297 U.S. 189 (1936). The Commonwealth has already represented, both in its pleadings and briefs below

and earlier in this statement that it had a pressing need to redress a severe imbalance in the relationships between the many Puerto Rican dealers and mainland or foreign manufacturers. This "discernible public purpose" found by the Puerto Rican legislature may not be cavalierly dismissed, as it was by the Court of Appeals, but must be examined in the light of the established principles of law laid down by this Court.

This Court has recognized that the test of the constitutionality of retrospective legislation is different in emergency situations than in non-emergency situations. *E.g., Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934). Considering the present state of the Puerto Rican economy and the legislatively ascertained problem with respect to the manufacturer-dealer relationship, characterized as "grave", it is submitted that this situation qualifies as an emergency for the purpose of evaluating Law 75. In any event, given the legislature's findings and the prevailing economic considerations, the statute should have been examined in the light of the leading decisions of this Court discussing emergency conditions. *Veix* v. *Sixth Ward Building & Loan Ass'n, supra; Home Building & Loan Ass'n* v. *Blaisdell, supra.* Had this been done, the court could well have reached a different conclusion.

An examination of the relative strengths of manufacturers and dealers, and thus of the degree to which the one may be disadvantaged relative to the other (grossly in the case of the Puerto Rican dealer), is of crucial importance in evaluating this statute. The Court of Appeals, it appears, concluded that manufacturers and dealers stood in relatively the same position and bargained on the same level. (423 F.2d at

567-568) Such an assumption is on its face clearly erroneous. Dealership agreements are notoriously take-it-or-leave-it contracts. In any event, the Puerto Rican legislature made an express finding as to the conditions prevailing in Puerto Rico, and that determination should be controlling unless overwhelmingly contradicted by the evidence. *Day-Brite Lighting, Inc.* v. *Missouri, supra; Ferguson* v. *Skrupa, supra; Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *East New York Savings Bank* v. *Hahn, supra; West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937); *Nebbia* v. *New York*, 291 U.S. 502 (1934). Certainly, it should not be summarily brushed aside merely on pleadings and briefs as it was by the court below.

These several errors and omissions by the Court of Appeals require correction by this Court on appeal.

3. The Court of Appeals Should Have Abstained From Determining Constitutionality Pending an Authoritative Interpretation of Law 75 by the Puerto Rican Courts

Under the established rules of abstention, where a state court's interpretation of state law may obviate any need for the federal courts to consider its validity under the Federal Constitution, the federal courts should stay their hand so that a constitutional decision is not rendered unnecessarily. *Reetz* v. *Bozanich*, —— U.S. ——, 25 L.Ed. 2d 68 (1970); *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134 (1962); *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959).

In the *Reetz* case this Court reversed the invalidation of Alaskan fishing laws by a three-judge court in order to enable the parties to repair to a state tribunal

for a resolution of their state law questions. The case relied on in *Reetz* was *City of Meridian* v. *Southern Bell Tel. & Tel. Co., supra,* where this Court, reversing the action of lower federal courts in invalidating a Mississippi statute, stated at pp. 640-641 as follows:

> "Proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions. . . . That is especially desirable where the questions of state law are enmeshed with federal questions. . . . Here, the state law problems are delicate ones, the resolution of which is not without substantial difficulty—certainly for a federal court. . . . In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily."

The determination of unconstitutionality by the Court of Appeals was inappropriate because the Supreme Court of the Commonwealth of Puerto Rico has rendered no decision as to this law. The only case to which the Court of Appeals made reference was from the Superior Court of Puerto Rico, *Construction Machinery and Supplies Corp.* v. *Construction Machinery Co.,* attached to the District Court's Memorandum and Order which is attached hereto as Appendix B. The *Construction Machinery* case, which upheld the constitutionality of Law 75, is far from being the last word of the courts of the Commonwealth of Puerto Rico on all relevant aspects of the

statute. The statute's provisions as to damages which the Court of Appeals found offensive have not been definitively interpreted by any Puerto Rican court. The damage provisions, and in fact the whole statute, are open to a number of interpretations which when finally resolved by the Puerto Rican courts could greatly diminish or entirely dispel any allegedly offensive features of the statute. Under this procedure, of course, all objections under the due process clause of the Constitution might well be similarly eliminated.

Another most important consideration, wholly ignored by the Court of Appeals, is that Puerto Rico has a civil law system which differs significantly from a common law system. Clearly, therefore, the ablest bodies to evaluate and interpret Law 75 in the first instance are the lower courts and the Supreme Court of Puerto Rico.

4. The Court of Appeals Improperly Ruled on the Constitutionality of Law 75 in the Absence of a Factual Record

The court below, drawn no doubt by its predilections against Law 75, assumed that the statute completely abolished an absolute right of the manufacturer unilaterally to terminate the dealership contract, and relied heavily on that and other equally unsupported assumptions in striking down the statute. There was, however, no factual record in this case. It was presented to the Court of Appeals on a ruling denying defendant's motion to dismiss the complaint, and no factual questions whatsoever had been resolved.

The court's action was, therefore, clearly improper. Constitutional decisions cannot be rendered on assumptions but must be based upon adequate facts. As Mr.

Justice Frankfurter stated while still a Harvard Law School Professor:

> "The stuff of these [constitutional] contests are facts, and judgment upon facts. Every tendency to deal with them abstractedly, to formulate them in terms of sterile legal questions, is bound to result in sterile conclusions unrelated to actualities. The reports are strewn with wrecks of legislation considered *in vacuo* and torn out of the context of life which evoked the legislation and alone made it intelligible. These are commonplaces. But they are the heart of the matter of American constitutional law. A failure scrupulously and persistently to observe these commonplaces jeopardizes the traditional American constitutional system. . . ." 37 Harv. L. Rev. 1002, 1002-3 (1924)

The action of the Court of Appeals in expressing its views as to the unconstitutionality of Law 75 in the abstract amounts to an advisory opinion which, it has long been established, the courts may not be called upon to give. *E.g., Alabama* v. *Arizona*, 291 U.S. 286 (1934); *Muskrat* v. *United States*, 219 U.S. 346 (1911).

5. The Error of the Court of Appeals Is Far-reaching

The effect of the erroneous decision below is not limited to this isolated case nor merely to other cases arising in Puerto Rico. Many state legislatures and the Congress of the United States have addressed themselves to the problem of the small businessman and have attempted through legislation to protect his investment in hard work and capital where threatened through no fault of his own. If the decision of the Court of Appeals is permitted to stand, state legis-

latures and the Congress of the United States could be inhibited by due process considerations from adopting similar measures applying to continuing business relationships.

The history of the Hart Bill, S. 1967, 91st Cong., 1st Sess. (1969), before the Antitrust and Monopoly Subcommittee of the United States Senate Judiciary Committee, is indicative of the problem. This bill would regulate the relationship between franchisor and franchisee in an attempt to balance the economic power in this relationship, which is now weighted heavily in favor of the former. Opponents of the bill were quick to use the decision of the Court of Appeals in this case to raise alleged constitutional impediments to its passage, and on May 18, 1970 the Subcommittee in executive session "voted to indefinitely postpone" all further action on the measure. 116 Cong. Rec. D 501 (Daily Ed. May 19, 1970).

CONCLUSION

The United States Court of Appeals for the First Circuit allowed its distaste for Law 75 to lead it, erroneously, to ignore this Court's established precepts of constitutional interpretation applying to state economic regulation. If Law 75 is truly retrospective in its application, the Court of Appeals nevertheless failed to follow this Court's clearly enunciated principles for analyzing and evaluating the effect of such retrospectivity. Further, the federal courts should stay their hand pending a definitive interpretation of Law 75 by the Supreme Court of the Commonwealth of Puerto Rico. In any event, the determination of unconstitutionality of Law 75 in the absence of any factual record was clearly improper.

Allowing the decision of the Court of Appeals to stand would permit the continuation of the practices which the Puerto Rican legislature sought to eliminate. The large number of dealers in the Commonwealth would continue to be disadvantaged and helpless—all to the damage of the economy of Puerto Rico. The decision also has an inhibiting effect on state legislatures and the Congress of the United States in their consideration of similar statutes to protect franchised and other dealers.

The questions presented by this appeal are substantial and of great public importance.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7422

ARTURO FORNARIS, JR., *Plaintiff, Appellee,*

v.

THE RIDGE TOOL CO. ET AL., *Defendants, Appellants,*

and

THE COMMONWEALTH OF PUERTO RICO, *Intervenor.*

Appeal from the United States District Court
for the District of Puerto Rico

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

March 17, 1970.

ALDRICH, *Chief Judge.* On June 24, 1964 the Puerto Rico legislature enacted the so-called Dealer's Contract Law known as Law 75. 1964 Laws of Puerto Rico, 4th Sess., at 231 (approved June 24, 1964). Its exact terms we will come to presently, but in effect this statute provided that a Puerto Rico dealer's contract with a "principal," hereinafter manufacturer, regardless of its provisions for termination was, with certain exceptions, renewable

indefinitely at the option of the dealer, and imposed substantial damages upon a manufacturer who refused to accede. On June 23, 1966 the scope of the obligation was enlarged to forbid the manufacturer from performing, irrespective of the provisions of the contract, "any act detrimental to the established relationship." 10 L.P.R.A. § 278a (1968 supp.). In spite of this legislation a number of manufacturers acted to terminate or otherwise change their dealers' agreements, and much litigation has ensued. Because of diversity of citizenship the bulk, apparently, of the cases were removed to the district court, where the defendants raised constitutional and other defenses. The court resolved these defenses in the plaintiff's favor in *Ruiz* v. *Economics Laboratory, Inc.*, D.P.R., 1967, 274 F. Supp. 14, and in the defendant's favor, in a more limited situation, in *United Medical Equipment Corp.* v. *S. Blickman, Inc.*, D.P.R., 1966, 260 F. Supp. 912. In the *Blickman* case the plaintiff appealed, and because of the great importance of the legislation we issued a general invitation for amicus briefs. Many were filed. We specially invited the Commonwealth to brief and argue the question of constitutionality, which it graciously did.

After argument, but before we had completed our opinion, the *Blickman* case (No. 6876) was settled, mooting the appeal. Thereafter we were asked to accept an interlocutory appeal in the present case pursuant to 28 U.S.C. § 1292(b). The parties did not request oral argument. By order we took the appeal on the briefs of the parties and transferred all earlier briefs, amicus and otherwise, filed in the *Blickman* case. We invited the Commonwealth to file a supplemental brief, which it has done. In addition, we have the benefit of the opinion of the Puerto Rico Superior Court in *Construction Mach. & Supplies Corp.* v. *Construction Mach. Co.*, decided December 23, 1968, upholding the act's constitutionality.

In the present complaint plaintiff Fornaris, a citizen of Puerto Rico, alleges that for twenty-nine years he had been

the exclusive distributor in Puerto Rico of merchandise manufactured by the defendant The Ridge Tool Company, an Ohio corporation; that on November 26, 1965, effective as of April 15, 1966, defendant "cancelled and/or terminated, without just cause the distributorship contract," contrary to the law of Puerto Rico.[1] It is not alleged that the termination was contrary to the terms of the contract itself, and we assume that it was in accordance therewith, and that plaintiff's rights depend solely upon Law 75. Defendant moved to dismiss on the ground that this law is unconstitutional, stating various reasons therefor. The court denied the motion on the basis of its opinion in *Ruiz* v. *Economics Laboratory, Inc.*, *supra*, and defendant appeals.

Before considering the precise terms of Law 75 it is pertinent to review the circumstances that led to its passage, and the declared purposes sought to be achieved. The legislature appended the following statement.

"STATEMENT OF MOTIVES

"The Commonwealth of Puerto Rico can not remain indifferent to the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, concessionaries [sic], or agents, as soon as these have created a favorable market and without taking into account their legitimate interests.

"The Legislative Assembly of Puerto Rico declares that the reasonable stability in the dealer's relationship in Puerto Rico is vital to the general economy of the country, to the public interest and to the general welfare, and in the exercise of its police power it deems

[1] This must have meant Law 75, as plaintiff's action was prior to the 1966 amendment. We do not, in this opinion, reach the amendment except to observe the obvious, that it presents many additional problems.

it necessary to regulate, insofar as pertinent, the field of said relationship, so as to avoid the abuse caused by certain practices."

We take this statement to be a summary of, and to represent an adoption of, the unanimous Report of the Committee on Industry and Commerce recommending the act in the form that it was eventually passed. The committee stated that it proposed the law because terminating dealerships "as soon as these have created a favorable market for their products, frustrat[ed] the legitimate expectations and interests of those who have so efficiently fulfilled their responsibilities."[2] See, generally, 18 Diario de Sesiones, Asambla Legislativa (Camara), May 22, 1964, pp. 1723-25. With respect to the "reasonable stability in the dealer's relationship," further amplification is to be found in 34 Rev. Jur. de la U.P.R. 497, quoted at length in the *Construction Machinery* opinion. Briefly, it was felt that cutting off dealers, with the manufacturer establishing its own sales office or branches, leads to instability of local investments and to the export of profits. Conversely, if manufacturers can terminate with impunity, some may withdraw altogether. Some Puerto Rico branches are marginal compared with other branches in the United States, and consequently are the first to be closed in case of declining business, to Puerto Rico's detriment.

We have gone into this background supplied by the parties not only because it shows the purposes of the act, illuminating the propriety, or possibly, impropriety, of its provisions, but also because of the assistance it may give in resolving doubts as to the statutory meaning. Law 75 itself is relatively brief. A manufacturer may never terminate, regardless of the provisions of the contract, or refuse to renew the dealership on an agreed expiration date, except for "just cause." Law 75, § 2, 1964 Laws of Puerto

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[2] For this, and certain other quotations, we rely upon translations from the Spanish furnished by various parties and not contradicted.

Rico at 232 (approved June 24, 1964).[3] "Just cause" is legislatively defined as substantial failure of performance by the dealer.[4] In case of breach of the statutorily imposed obligation, damages "shall be fixed on the basis"[5] of a specified list of items. Law 75, § 3. These are substantial, particularly with respect to awarding the dealer the entire good will value of the agency without inquiry or adjustment for what portion may have been due to the acts of the manufacturer, or even of prior dealers. To this figure is added, cumulatively the Commonwealth concedes, the amount of profits for the past five years. Law 75, § 3(d).[6] There is no provision for mitigation should it appear that the dealer had successfully transferred into an equally profitable line. Even apart from such lack of offsets, the award of both good will and loss of profits amounts to duplication. The parties are precluded from agreeing otherwise. Law 75 § 4.

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[3] "Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may terminate said relationship or refuse to renew said contract on its normal expiration, except for just cause:"

[4] "[J]ust cause: nonperformance of any of the essential obligations of the dealer's contract, on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service." Law 75, § 1(d).

[5] It was conceded during the oral argument of the *Blickman* case that the Spanish, "se fijara a base" is mandatory.

[6] If the dealer has been in business less than five years, an appropriate multiple is provided to determine the equivalent of five years. It may be noted that the effect of this provision is exactly to contradict the declared reason for the act—that dealers are cut off "as soon as they have developed a favorable market." On that basis their past profits would be negligible. If, however, the dealer had not received this unfortunate treatment, but had been permitted a long, prosperous career to reward him for his entrepreneur services, then his award under this section would be substantial.

In upholding the constitutionality of the application of the act to the present defendant the district court, as did the superior court in the comparable case, relied upon the police power. There can be no question but that this power permits the legislature to remedy various economic evils. All courts recognize, however, that retrospective legislation, affecting established rights and relationships, presents an additional problem. While the legislature may prevent an employee willing to contract to work for a low wage from doing so, *West Coast Hotel Co.* v. *Parrish*, 1937, 300 U.S. 379, the retrospective imposition of a minimum wage would be quite a different matter. *See Luce & Co.* v. *Minimum Wage Board*, 1943, 62 P.R.R. 431, *aff'd* 1 Cir., 1946, 155 F.2d 983, where the court stated, in dictum, that a statute granting additional benefits for "services entered into and executed . . . before the same went into effect . . . would be unconstitutional, since it would deprive the employers of their property without due process of law." 62 P.R.R. at 449. We cannot agree with the many arguments, variously advanced, that the case at bar does not involve similar retrospectivity. If at the time that Law 75 was passed a manufacturer had contracts with dealers that he could terminate at will without liability, and thereafter, because in the opinion of the legislature such a result would deprive the dealers of their expectations based upon their having "so efficiently fulfilled their responsibilities" it must make substantial payments on termination, we can only regard this as increased payment for past services. Indeed, if it is not, it is an amendment of the contract to require an outright gratuity.

We need not deal with a constitutional prohibition against impairing the obligation of contracts,[7] because the due

[7] The argument goes that Puerto Rico is not subject to certain constitutional restrictions because not a "state." *Cf. Buscaglia* v. *Ballester*, 1 Cir., 1947, 162 F.2d 805. However, the Puerto Rico Constitution contains a provision comparable in this respect to the federal Bill of Rights. Puerto Rico Constitution Art. II, § 7. Since

process clause of the federal constitution provides essentially the same restraint so far as retrospectivity is concerned.[8] We have no thought that Puerto Rico is in a more favored position in this respect than is a state or the federal government. *Figueroa Ruiz* v. *Delgado*, 1 Cir., 1966, 359 F.2d 718, 723-24, *Mora* v. *Mejias*, 1 Cir., 1953, 206 F.2d 377, 382. *See* 48 U.S.C. § 731d; Joint Resolution, 66 Stat. 327. (July 3, 1952). Hence only minor infringement of established contractual rights may be effected without just compensation. "Police power" is not a magic word that permits the legislature to adjust any and every found economic ill without payment.

In determining whether retroactive alteration of contractual provisions are sufficiently minor to be permissible a distinction is sometimes drawn between alteration of substantive rights and alteration of procedures or remedies. *See Stockholders of Peoples Banking Co.* v. *Sterling*, 1937, 300 U.S. 175, 180-83 (alternative holding). However, even the latter may infringe constitutional rights, Hale, *supra* n. 8, at 533-57, *W. B. Worthen Co.* v. *Kavanaugh*, 1935, 295

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this provision might be said to have been imposed by Congress, see Act Mar. 2, 1917, c. 145, § 2, 39 Stat. 951, as amended, 41 Stat. 1096, 47 Stat. 158, 48 Stat. 361, 61 Stat. 772, repealed, except for last paragraph, Act July 3, 1950, c. 446 § 5(1), 64 Stat. 320, an argument might be made in favor of the federal court's interpretative and enforcement powers by one route or another. By suggesting the question we do not suggest the answer.

[8] "Although there is no clause expressly forbidding the federal government to pass laws impairing the obligation of contracts, any federal law impairing them in a manner which the Supreme Court deemed unreasonable would doubtless be held to be a deprivation of property without due process, contrary to the Fifth Amendment." Hale, The Supreme Court and the Contract Clause: III, 57 Harv. L. Rev. 852, 890 (1944). *Accord*, Hochman, The Supreme Court and the Constitutionality of *Retroactive Legislation*, 73 Harv. L. Rev. 692, 695 (1960). *Cf. Lynch* v. *United States*, 1934, 292 U.S. 571, 579; *Thorpe* v. *Housing Authority*, 1969, 393 U.S. 268, 278-79, nn. 31-32.

U.S. 56, while the former can sometimes be tolerated if the effect is not too severe. *El Paso* v. *Simmons*, 1965, 379 U.S. 497, 503-08. Essentially, the question is, how drastically have property rights been affected, and, particularly, how great is the change viewed in the light of the reasonable expectations of the parties when the contract was entered into. *See El Paso* v. *Simmons, supra; Home Bldg. & Loan Ass'n* v. *Blaisdell*, 1934, 290 U.S. 398. The distinction is one of degree. For example, emergency statutes allowing a tenant to stay beyond the term of his lease upon payment of reasonable rent have been upheld as reasonable alterations, *Block* v. *Hirsh*, 1921, 256 U.S. 135; *Marcus Brown Holding Co.* v. *Feldman*, 1921, 256 U.S. 170, whereas a statute which would have destroyed a mining company's reserved right to mine coal underneath land, the balance of which had been sold by it, has been invalidated as working a change of too great magnitude. *Pennsylvania Coal Co.* v. *Mahon*, 1922, 260 U.S. 393. See generally *Hochman, supra* n. 8, at 711-17.

While we recognize a strong obligation to support legislative findings, the Report of the Committee on Industry and Commerce to the effect that the termination of dealerships in terms revocable at will was "frustrating the legitimate expectations" of the dealers cannot possibly be true. Dealers may have had hopes; they could have no legitimate expectation of non-terminable contracts. *Cf. Castillo* v. *Smart Products, Inc.*, D.P.R., 1968, 289 F.Supp. 138. Sounding phrases, and calling the failure to make termination payments an "abuse," cannot change the fact that the manufacturer has been forced into heavy contractual obligations that it never assumed. No amount of research by parties or amici has discovered a case suggesting that to convert a contractual relationship terminable by either party without cause into one which, short of breach by the other party, can be terminated by one of the parties only by making substantial payments and without protection

for the other party's economic interests, is not a change of great magnitude.[9]

We do not agree with the position of the opponents of the act that the phrase "just cause" is unconstitutionally vague and unspecific. However, the Commonwealth's protestation, in the *Blickman* brief, that it "cannot conceive that the Legislature, which was enacting a remedial statute to correct an injustice, could have intended and permitted, through legislation, the perpetration of another injustice," is far more pious than persuasive. To our comment that the statute is one-sided, the Secretary of Justice on behalf of the Commonwealth, urged us to read it in the light of various general provisions of Puerto Rico law applicable to the construction of contracts. This we have done. We end up convinced that the only defense open to a manufacturer to an action under Law 75, short of proof of breach by the dealer, would be impossibility of performance. 31 L.P.R.A. § 3193. To add to "just cause," as was suggested, good faith, or the legitimate interests of the manufacturer, would be to fly in the face both of the unambiguous statutory provisions, and the equally unambiguous legislative history. The fact that a dealership has become economically highly disadvantageous is not excusable impossibility, but is, precisely, a contingency that the legislature sought to guard against.

Some of the proponents of the act invite a comparison with the federal Automobile Dealers Day in Court Act, 15 U.S.C. § 1221-25, hereinafter the Federal Act. The comparison is ill-taken. In fact, it is precisely to the extent

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[9] If we may be forgiven a rude comparison, the change seems comparable to a legislative retrospective conversion, in the asserted interest of public morals, of all temporary liaisons into marriage, with the necessity of divorce and alimony. Indeed, it is worse, for until Law 75 was enacted temporary dealerships were in all respects legal.

that Law 75 departs from the provisions of that statute that it is in difficulties.

The unusual position in which automobile dealers find themselves has long been known to this court.[10] Because they are normally locked in, with no other source of income and no easy opportunity to convert to other lines, an unscrupulous manufacturer is able to take advantage of its dealers by making unjustifiable demands, such as requiring needlessly large showrooms, or the purchase of undesired parts or models, under threat of cancellation of the dealership. It was found that many manufacturers were engaging in such practices. See generally, Kessler, Automobile Dealer Franchises: Vertical Integration by Contract, 66 Yale L.J. 1135 (1957). The Federal Act did not seek to convert terminable automobile dealers contracts into non-terminable ones, but was tailored to prevent contractually unjustified demands by giving a cause of action for damages resulting from unfair "coercion" and "intimidation." 15 U.S.C. § 1221(e). Absent such improper behavior, any action within the terms of the contract remained permissible, including outright termination without proof of grounds therefor. *Berry Bros. Buick, Inc.* v. *General Motors Corp.*, E.D.Pa., 1966, 257 F.Supp. 542, 546, *aff'd mem.* 3 Cir., 1967, 377 F.2d 552; *cf. Southern Rambler Sales Inc.* v. *American Motors Corp.*, 5 Cir., 1967, 375 F.2d 932, *cert. denied* 389 U.S. 832; 15 U.S.C. §§ 1221, 1222.

By contrast, Law 75 applies to every kind of dealer across the board. As pointed out in the memorandum opinion of the district court in *Felix A. Rodriguez, Inc.* v. *Bristol-Myers Co.*, D.P.R. 2/13/68, many types of dealers carry numerous articles and lines, or can readily convert and absorb the loss of a single manufacturer. Such dealers are not subject to pressure by threats of cancellation. Nor

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[10] *See Volkswagen Interamericana, S.A.* v. *Rohlsen*, 1 Cir., 1966, 360 F.2d 437, *cert. denied* 385 U.S. 919; *Young Motor Co.* v. *Com'r*, 1 Cir., 1960, 281 F.2d 488.

was the Puerto Rico act framed in terms of illegitimate demands—except to say that adherence to the contract terms was itself illegitimate. By labelling the exercise of express contractual rights "unjust" the legislature was not giving a cause of action for contractual abuse; it was rewriting the contract.

Comparing Law 75 with the Federal Act in terms of retrospectivity is, in a sense, merely an intellectual exercise. The parties have cited no case holding even the Federal Act constitutionally retrospective. Non constat, in the light of the differences, that it might properly be so held had the question arisen.[11] Law 75, however, cannot be.

The judgment of the District Court is vacated. Judgment for the defendant.

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[11] We do not reach the question of non-retrospective application of Law 75, as we may wonder how many such dealerships have been established. Since the provisions of the law are non-waivable, manufacturers who are unwilling to accept them will not enter into dealership contracts at all, and dealers who would prefer to have dealerships omitting such benefits rather than have none, have lost, to that extent, their freedom of contract. It is possible that if the legislature had realized that the law could be applied only prospectively it would not have enacted it. With this matter, however, we are not presently concerned.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 546-66

Re: DAMAGES

ARTURO FORNARIS, JR., *Plaintiff*

v.

THE RIDGE TOOL COMPANY and
THE RIDGE TOOL INTERNATIONAL COMPANY, INC.,
Defendants

THE COMMONWEALTH OF PUERTO RICO, *Intervenor*

Memorandum and Order

On March 12, 1968 this Court entered an order staying proceedings in this action pending determination of an action entitled *United Medical Equipment Corporation v. S. Blickman, Inc.*, which at that time was pending before the Court of Appeals for the First Circuit, Case Number 6876, and wherein the constitutionality of Law Number 75 of June 24, 1964, as amended (10 L.P.R.A. 278), was being challenged on the same grounds as those raised by the defendants in this case through their motion to dismiss. The matter of the constitutionality of the Dealer's Act was fully briefed and oral argument was had before the Court of Appeals, but the case was settled prior to decision.

A similar fate befell the case of *Carmac Chemical Corporation v. Application Engineering Corporation* (Court of Appeals for the First Circuit, Case Number 7177). In this case, the First Circuit, as per Order of Court, August 29, 1968, took the position that it would appreciate an opportunity to consider the views of at least the Superior Court of Puerto Rico on the constitutionality of the Dealer's Act. Accordingly, it neither allowed nor denied

the interlocutory appeal and stated that upon receipt of any decision and opinion from the Superior Court of Puerto Rico, and upon a joint stipulation or a deposition or other showing of the terms, conditions and surrounding circumstances, the Court would again consider the application for leave to appeal in the *Carmac* case. Once again the parties settled the case and there is now no case pending before the United States Court of Appeals which raises the constitutionality of the Dealer's Act.

The matter of the constitutionality of the Dealer's Act has now been passed upon by the Superior Court of the Commonwealth of Puerto Rico in the case of *Construction Machinery and Supplies Corporation* v. *Construction Machinery Co.*; Civil Number 67-3549. A translation of this case is set out as Exhibit A to this order, and made to form a part hereof by reference.

A motion for reconsideration of the Superior Court Order was denied on March 11, 1969 by said Tribunal.

In view of the foregoing developments, this Court ordered that this case be set for some disposition and set a hearing thereon for June 13, 1969. By motion dated June 9, 1969, attorneys for the plaintiff requested that on the basis of the decision rendered by the Superior Court of Puerto Rico in the case of *Construction Machinery and Supplies Corp.* v. *Construction Machinery Co., supra,* and on the basis of this Court's prior decision upholding the constitutionality of the Dealer's Act of Puerto Rico we order the dismissal of defendant's motion to dismiss and order the defendants to file their answer to the complaint filed in this case.

We agree with plaintiff that the motion to dismiss should be denied on the basis of our prior decision in this area [*Ruiz* v. *Economics Laboratory, Inc.*, 274 F. Supp. 14 (1967)]. This Court is of the opinion that the order of dismissal of the constitutional defense raised by the defendants involves a controlling question of law as to which there is substantial ground for difference of opinion

in this jurisdiction and that an immediate appeal from this order may materially advance the ultimate termination of this litigation and of many others presently pending in this Tribunal. In conformity with 28 U.S.C.A. § 1292(b) and inasmuch as a rapid adjudication of the constitutionality of the Dealer's Act is not only in the best interests of the parties to this action, but is also in the furtherance of justice, it is hereby

ORDERED

1. Defendant's motion to dismiss on constitutional grounds is denied (*Ruiz v. Economics Laboratory, Inc.*, 274 F. Supp. 14 (1967); *Construction Machinery and Supplies Corp. v. Construction Machinery Co.*, Civil Number 67-3349, Superior Court of Puerto Rico, San Juan Part).

2. This Court is of the opinion that this order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly, this Court hereby so states as required by Section 1292(b) of Title 28 U.S.C.A.

3. All further proceedings in this case are stayed until further order of this Court.

San Juan, Puerto Rico, this 8th day of August, 1969.

HIRAM R. CANCIO
Hiram R. Cancio
Chief Judge
United States District Court

IN THE SUPERIOR COURT OF PUERTO RICO
SAN JUAN PART

Civil No. 67-3549

Re: DAMAGES

CONSTRUCTION MACHINERY & SUPPLIES CORPORATION,
Plaintiff

v.

CONSTRUCTION MACHINERY CO.,
Defendant

COMMONWEALTH OF PUERTO RICO,
Intervenor

Opinion

The matter before the court is a special defense filed by defendant in this case on May 13, 1968 in which there is alleged the unconstitutionality of Law #75 of 1964, as amended.[1]

[1] The circumstances that led to the intervention by the Legislature of Puerto Rico are amply set forth in 34 Rev. Jur. de la U. P. R. p. 497. The following appears there:

"Law No. 75 of June 24, 1964 is of great importance for contractual relationships between principals and distributors in Puerto Rico. We shall study two aspects of it. First, the manner in which said contracts are affected by the law. Second, the constitutional issues raised by the same. This second part of the study will be carried out by means of a comparative analysis of other similar laws that are in effect in different jurisdictions of the United States. Similarly, the jurisprudence which has arisen in connection with these statutes will form a part of our analysis.

The social ill that this piece of legislation seeks to correct is based upon the fact that a great number of distributors based in Puerto Rico have been eliminated as factory representatives. This tendency caused the voices of the Chamber of Commerce of Puerto Rico and of the individual distributors to be heard in protest against the existing situation. Said

After having studied the memoranda of the parties, as well as the oral argument, we may pass on to consider the allegations.

I. The defendant alleges that Act No. 75 of 1964 impairs the obligations of contracts existing at the time of its approval.

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tendency is characterized by two types of situations: principals or grantors that arbitrarily cancel the distribution contracts of businessmen established in Puerto Rico; and the factories that decide to open their own sales offices or branches. The distributors faced these problems espousing several arguments. This group maintains that the development of a market for the represented products requires great sums of money. That once the products are on the market, the factories, not withstanding the effort and the capital invested, cancel the contracts and establish themselves here without providing any indemnity whatever. It is pointed out that the system by means of which the manufacturers establish sales offices or branches creates an instability that impedes the strengthening of the field of local capital investment. It is also said that when branches or sales offices are established, these export a large part of the profits earned in Puerto Rico.

Some of the established branches are classified as marginal branches. These are the sales offices located in markets that are small when compared to other branches in the United States. They are the first to be closed in time of emergency, which would force Puerto Rico to recur directly to the north-american market to obtain indispensable items, especially in the field of industry. This class also incurs greater general expenses relative to sales and the product which would result in a price increase and a reduction in services.

Local distribution serves as an incentive to those persons who want have their own business. A manager of a branch cannot become interested in the problems, ambitions and needs of our community. The distributors claim that the manager of a branch has as his purpose the securing of a promotion to be sent to another country or to the home office as an executive and, for that reason, is not interested in the well-being of the Puerto Rico economy. The persons in charge of the sales office do not fully know the motivations or factors that motivate the decisions that must be put into effect, inasmuch

In support of this allegation the defendant cites the provisions of Article 1207 of the Civil Code and the first article, tenth section of the Constitution of the United States of America and the second article, seventh section of the Constitution of the Commonwealth of Puerto Rico.

The provisions cited above have not been violated by this Law of the Legislature of Puerto Rico. It is a principle

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as these are made by the Board of Directors at the home company. Said decisions may very well result in a detriment to the Puerto Rico market due to the fact that standards and methods used in the northamerican nation are not necessarily applicable to our market. The distributor established in Puerto Rico by his very nature and experience is more familiar with the country's market. We can say that he knows the psychology of the consumer. As a result this singular position allows the person to adequately determine the preferences of the consumer in terms of the type of product desired and the amounts that may be consumed, thus maintaining a beneficial balance for the economic stability of our community.

'Those who are opposed to a system of distribution of products and services through exclusive distributors claim that it 'is an unnecessary and expensive middle step that only contributes to an increase in the costs of distribution.' The opposing side argues that it is 'an indispensable factor for the marketing system. This is based upon the following: 'Due to our insular condition to the fact that our market is separated from the principle sources of supply by an enormous stretch of sea, to our geographical smallness and lack of natural resources and because potential sales and business volume in our island is relatively small, to the manufacturer it would normally be uneconomic to eliminate the exclusive agent or distributor and establish its own branch for sales, or to sell to consumers from its point of origin or to local wholesalers and retailers. The exclusive agent or distributor is a functional intermediary that with the exception of certain isolated cases, may not be eliminated or cut back without causing injury to the efficiency and costs of our distribution system, for they render important services in an atmosphere of competition to the producer and the consumer in a manner more efficient and economic than the very manufacturers.'

The circumstances set forth above led the legislature to act. It was forced to resolve the problem put to it by a pressure

recognized by the courts of Puerto Rico and of the United States of America that this right of freedom of contract is not one without limit of any kind. The same is conditioned by the police power of the state. Article 1207 of our Civil Code contemplates this when it provides that:

> "The contracting parties may make the agreements and establish the clauses and conditions which they may deem advisable, provided they are not in contravention of law, morals or public order". (31 LPRA 3372)

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group: the need to stop the principals, or at least to seek indemnification for the distributors. It was the practice to include a clause in which it was provided that either of the parties by means of 30, 60, or 90 days notice could cancel the existing relationship. The principal, making use of its bargaining power, managed to include in the contract this and other clauses favorable to it.

In order to remedy this situation, the Legislative Assembly of Puerto Rico, invoking the police power of the State, approved the law now before us for the purpose of regulating the termination of distribution contracts and a refusal to renew the same. The statute expressly provides that no principal or grantor may unilaterally terminate a distribution contract or refuse to renew the same without just cause, notwithstanding any agreement to the contrary.

If the principal or grantor terminates the contractual relationship, without just cause, it must indemnify the distributor. The rights granted by the law are of a public nature, and therefore not waivable. All actions based upon the law prescribe in three years reckoned from the date of the definitive termination."

In light of the foregoing examination it is evident that the problems and needs of Puerto Rico are in large measure different from those of the United States of America and the existing relationship between the two requires a more equitable and special consideration in order to arrive at the conclusions of this opinion. We can not forget that Puerto Rico is a small island (3,500 square miles), tropical, with few natural resources, depending, for this reason, greatly upon business".

In *Manigault* v. *Spring*, 199 U.S. 473 (1905), it was noted that:

> "This power . . . is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals".

Reference may also be made to *Sierra* v. *San Miguel*, 1949, 70 P.R.R. 573, in which the Honorable Supreme Court of Puerto Rico referring to the same question notes that "no rule is more firmly embedded in our constitutional law than this doctrine". See further, *Veil* v. *Sixth Ward Building*, 310 U.S. 32; *Anderson* v. *Brand*, 303 U.S. 95; *City of El Paso* v. *Simmons*, 379 U.S. 497.

Law No. 75 was created to remedy an existing "grave situation" that would still exist if it were not for the promulgation of said law. See page 1531 of the Record of Meetings of the Legislative Assembly of Puerto Rico of 1964 where it is said:

> "Your Committee on Industry and Commerce has considered the substitute to S. B. 673 and has the honor of proposing that it be approved without amendment.
>
> The problem created in the system of distribution in Puerto Rico by the intemperate action of foreign and domestic business concerns that, without just cause, cancel their relationships with their distributors and agents in Puerto Rico, as soon as those have created a favorable market for their products, frustrating the legitimate expectations and interests of those who have so efficiently met their responsibilities, has recently worsened.
>
> Normally, the agency or distribution contract is drafted by the manufacturer with clauses favorable to it, and a provision to the effect that the relationship may be terminated by either of the parties, by means

of prior notice of sixty or ninety days. The distributor or agent efficiently devotes himself to opening the market for the represented product, and, when he begins to derive benefits from the operation, once the market is established, the manufacturer realizes that it would be economically favorable to establish its own sales office or its own branch, and in an unjust manner, without equitable compensation for the efforts expended by the distributor or agent, cancels the relationship. In other cases, the manufacturer finds another person who, the business being established, is willing to distribute the product for less compensation, because he doesn't have to make the initial investment, and is not subject to the risks of the prior distributor or agent.

The traditional provisions which regulate contracts between private parties have shown themselves to be incapable of protecting the legitimate rights of the distributor or agent, and for this reason it has become necessary to legislate to regulate this relationship and guarantee that the manufacturers will act in good faith, equitably, in a non-arbitrary manner, and to preserve for the distributor or agent the legitimate rights and expectations inherent in the relationship. Moreover, this will result in greater stability for the distribution relationship.

This is the grave situation that is sought to be remedied by the approval of this bill. The Department of Commerce of the Commonwealth of Puerto Rico, the Chamber of Commerce of San Juan, and the Agency for Industrial Development regard with accord and heartily endorse the protection and stability that would be given to the relationships between manufacturers and their distributors if this bill should be approved.

The Committee, unanimously, agreed to recommend the passage of this bill".

The defendant has noted that in said legislation the word "emergency" has not been used to justify the existence of said legislation. The expression "grave situation" within our language and culture and the interpretation which this Court makes of the legislative intent has a meaning similar to the English term "emergency", assuming, but without deciding, that the appearance of this term is an indispensable requirement. The Spanish term "emergencia" as a translation of the English term "emergency" is an anglicism.[2]

In the case of *Willy's Motor v. Northwestern Kaiser-Willy's, Inc.*, 142 F. Supp. 469 (D.C.-1956), there was contested the constitutionality of a Minnesota statute which contained greater requirements as to the relationship between manufacturers and distributors and at the same time covered a more restricted area than that covered by Law No. 75. The Court, in sustaining the constitutionality of the Minnesota statute, noted that legislation enacted with a public purpose was not subject to attack under the Contracts Clause.

Law No. 75 has a public purpose, as can be clearly seen from its legislative history as well as from its statement of motives;[3] for this reason, we are of the opinion that the

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[2] The Dictionary of the Royal Academy, eighteenth edition, defines the term "'emergencia' as the act or result of emerging, occurrence, a supervening accident.

[3] "Statement of Motives"

The Commonwealth of Puerto Rico can not remain indifferent to the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, concessionaries, or agents, as soon as these have created a favorable market and without taking into account their legitimate interests.

The Legislative Assembly of Puerto Rico declares that the reasonable stability in the dealer's relationship in Puerto Rico is vital to the general economy of the country, to the public interest and to the general welfare, and in the exercise of its police power, it deems it necessary to regulate, in as far as pertinent, the field of said relationship, so as to avoid the abuse caused by certain practices".

law does not suffer from the constitutional vice alleged and discussed above.

II. The defendant alleges as the second ground for the unconstitutionality of Law No. 75 that the Law violates the Due Process Clause as to manufacturers and that it is vague and imprecise as to its scope and definition of the term "just cause".

The standard to be used must be the reasonableness of the legislation. If the measure which we are considering is justified by social, economic, health, or general welfare considerations, and it is reasonable—the statute must be considered to be invulnerable to attacks of this sort.

In the case of *Blanke Brothers* v. *Ford Motor Co.*, 203 F. Supp. 670 (1962), the Court concluded that "the fact that Congress . . . gave the dealer a remedy . . . without giving the same remedy to the manufacturer, is not violative of the due process clause . . . .". See to the same effect the case of *Kuhl Motors Co.* v. *Ford Motor Co.*, 71 N.W. 2d 420.

III. The defendant alleges that Law No. 75 in its definition of just cause is unreasonable, arbitrary and capricious vague and imprecise. Said definition is not limited to its literal content. It constitutes a guide to the Court so that it may decide in the light of the facts of each particular case whether or not there existed just cause. This concept of just cause just like the concept of the reasonable man and the good head of a family is not a new concept in our law.

In the cases of *P. R. Cap. S. Tire Sales* v. *District Court*, 1948, 68 P.R.R. 370; *Avilés* v. *District Court*, 1948, 69 P.R.R. 106; *Blanes* v. *District Court*, 1948, 69 P.R.R. 106; *Mercedes Bus Line, Inc.* v. *District Court*, 1949, 70 P.R.R. 656, our Supreme Court considered the concept of "just cause" in accordance with the facts of each case brought

before its consideration. In each of these cases it can be appreciated how wide this concept of just cause is, as well as its usefulness in our system. The use of this concept in various laws is due to the fact that the legislature cannot foresee every possible fact situation when it drafts a law, leaving this function to the courts who must decide in accordance with the particular facts of each case. This Court cannot understand that the legislator has imposed as the only reason justifying a cancellation of the relationships the reasons which make up the definition of just cause.

This concept of just cause, in its turn, should further be supplemented, when a case may merit it, with statutory precepts drawn from other laws of the State. Such would be the case of a manufacturer who for economic reasons cannot continue to sell its products in our market. In a situation like this one, this Court is of the opinion that it would be necessary to go beyond the law and make applicable the provisions that are relative to the impossibility of performance contemplated by our Civil Code, in Art. 1138 (31 LPRA 3193). See *Rodríguez* v. *Municipality*, 75 P.R.R. 449; where the Supreme Court of Puerto Rico says that:

> "The impossible performance is produced when, having examined the circumstances on which a contract is signed and the circumstances on which it should be subsequently performed, it appears that its subsequent performance is not possible because of the supervening circumstances which did not exist at the time of contracting the obligation".

Summarizing, this concept of just cause must be interpreted case by case and always depending upon the particular facts of each one.[4] Obviously our own juridical

[4] Recently the Federal District Court for Puerto Rico, by the Hon. Judge Fernández Badillo expressed the same thought in the case of Schering Transamerican Corporation vs. Wallace Torres

system provides for cases in which compliance becomes impossible, and for this reason it is not correct to suppose that Law No. 75 of 1964 is unjust or oppressive in its terms.

There is nothing in the law that might be interpreted as indicating that the Legislature of Puerto Rico is discriminating against firms operating in interstate commerce. The law applies both to local firms and continental ones doing business in Puerto Rico. The present legislation is clearly within the police power which the Commonwealth of Puerto Rico possesses and within the clear intention of the Legislature of Puerto Rico to protect its citizens and businessmen.

It is worthy of note that in our commercial relations with the United States, Puerto Rico has received special treatment from the United States. Examples of this, among others, are the tariff laws dealing with sugar, coffee and rum exported from Puerto Rico. These and other similar laws, are founded upon the geographic and economic conditions of Puerto Rico and the lack of adequate natural resources, all of which has justified the special treatment as regards the other states of the Union.

IV. Defendant alleges that Law No. 75 violates the equal protection clause. The defendant further argues in its brief that the law in question operates for the sole and exclusive benefit of those distributors in existence at the

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Canet vs. Sutton Cosmetics, et. al., Civil No. 542-66 in noting in its opinion of September 30, 1968 the following:

"Defendant does not claim that Sutton Cosmetics could not have whatever arrangement it had with him. Certainly when Sutton Cosmetics went out of business, that was ample 'just cause' to terminate whatever relationship they had'.

"Nor does it preclude a state from giving needful protection to its citizens in the Course of their contacts with business conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration'.

time of its approval and that the manufacturers may not appoint additional distributors.

The equal protection clause does not imply that at any given moment the Legislature of a country may not establish a counterbalance in favor of a disadvantaged class.

In the case of *Kuhl Motor Co.* v. *Ford Motor Co.* (supra), the following was noted:

> "The fact that the persons to be benefited by this regulatory measure are confined to one class of our citizens, auto dealers, does not militate against the same being a legitimate exercise of the police power".

There exists in Puerto Rico and the United States a great quantity of legislation which is directed to the benefit of a particular class of individuals or persons. To contend that this may not be done is to bind the arms of the State in its mission to make all citizens equal in law.

There is nothing in this law that would lead this Court to think that new distributors may not be appointed inasmuch as the statute does not prohibit such action. What the law regulates is the termination of the existing relationship; or directly or indirectly executing an act which impairs the established relationship; or a refusal to renew said contract upon its normal expiration. (10 L.P.R.A. 278a).

The case before us does not involve the appointment of an additional distributor. It deals with the termination of a distribution contract. At the proper moment we will decide whether there existed or not just cause. There may be circumstances in which the appointment of a new distributor constitutes an impairment of the established relationship, but courts should not deal with hypothetical situations. This Court is of the opinion that if the manufacturer or principal names a new distributor and there is no impairment of the existing relationships between it and

the original distributor, said distributor is totally lacking a cause of action under this law. We have already said that Law No. 75 is one which should be interpreted case by case and that only after the presentation of the whole evidence will the Court be in a position to determine whether there was an impairment of the existing relationship, or if there was a unjustified refusal to renew a contract or if a contract was terminated without just cause.

The defendant alleges that Law No. 75 creates a monopoly in favor of the distributor. We do not see the logic of this observation. When an act, or series of acts in a particular case result in a monopoly or monopolistic practices prohibited by law, we will decide that problem in the light of the particular case. Neither the legislative history of Law No. 75, nor Law No. 77 of June 25, 1964, known as the monopoly law, provide a basis for this assertion. These laws were enacted contemporaneously so the legislators were aware of the contents and language of each when they were approved.

In connection with the damages contemplated by Section 278.b of the law (Title 10 L.P.R.A.), we are of the opinion that the same does not limit the power of the Court to indemnify a distributor upon the basis of the factors set forth in the said section.

For the reasons set forth, the Court concludes that Law No. 75 of 1964, as subsequently amended meets the constitutional requirements. The special defense pleaded by the defendant is therefore denied.

Let service be made.

Given at San Juan, Puerto Rico, this 23rd day of December, 1968.

/s/ HÉCTOR RUIZ SOMOHANO
Superior Court Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CIVIL No. 7422

ARTURO FORNARIS, JR., *Plaintiff, Appellee*

v.

THE RIDGE TOOL COMPANY, ET AL., *Defendants, Appellants*

and

THE COMMONWEALTH OF PUERTO RICO, *Intervenor, Appellee*

Notice of Appeal to the Supreme Court of the United States

To the Honorable Court:

1. Notice is hereby given that the Commonwealth of Puerto Rico, Intervenor, Appellee above named, hereby appeals to the Supreme Court of the United States from the Judgment opinion entered by this Honorable Court on March 17, 1970.

2. This appeal is taken pursuant to 28 U.S.C. Section 1254(2). In San Juan, Puerto Rico, this 26th day of May, 1970.

APPENDIX D

[No. 75]

AN ACT

To regulate the termination of, and the refusal to renew, under certain circumstances, certain dealer's contracts.

STATEMENT OF MOTIVES

The Commonwealth of Puerto Rico can not remain indifferent to the growing number of cases in which domestic and foreign enterprises, without just cause, eliminate their dealers, concessionaries, or agents, as soon as these have created a favorable market and without taking into account their legitimate interests.

The Legislative Assembly of Puerto Rico declares that the reasonable stability in the dealer's relationship in Puerto Rico is vital to the general economy of the country, to the public interest and to the general welfare, and in the exercise of its police power, it deems it necessary to regulate, insofar as pertinent, the field of said relationship, so as to avoid the abuse caused by certain practices.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—Definitions

For the purposes of this act, the following terms shall have the meanings expressed below, save when the context clearly indicates otherwise:

(a) dealer: person to whom is granted the distribution, agency, concession or representation of a merchandise or service for him to develop a market therefor and/or seek its sale or distribution in Puerto Rico;

(b) dealer's contract: relationship established between a dealer and a principal or grantor whereby the former takes charge of the distribution of a merchandise, or of

the rendering of a service, by concession or franchise, on the market of Puerto Rico;

(c) principal or grantor: person who executes a dealer's contract with a dealer;

(d) just cause: nonperformance of any of the essential obligations of the dealer's contract, on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service.

Section 2.—Notwithstanding the existence in a dealer's contract of a clause reserving to the parties the unilateral right to terminate the existing relationship, no principal or grantor may terminate said relationship or refuse to renew said contract on its normal expiration, except for just cause.

* * * * * * * * * * *

Section 3.—If no just cause exists for the termination of the dealer's contract or for the refusal to renew same, the principal will have committed a tortious act against the dealer and shall indemnify him to the extent of the damages caused him, the amount of such indemnity to be fixed on the basis of the following factors:

(a) the actual value of the amount expended by the dealer in the acquisition and fitting of premises, equipment, installations, furniture and utensils, to the extent that these are not easily and reasonably useful to any other activity in which the dealer is normally engaged;

(b) the cost of the goods, parts, pieces, accessories and utensils in stock, and from whose sale or exploitation he is unable to benefit;

(c) that part of the good will of the business of the dealer attributable to the sale of the merchandise or

service the object of the dealer's contract to be determined by taking into consideration the following factors:

(1) the number of years the dealer has had charge of the distribution;

(2) the actual volume of the sale of the merchandise or service and the proportion it represents in the dealer's business;

(3) proportion of the Puerto Rican market said volume represents;

(4) any other factor that may establish equitably the amount of said good will;

(d) the amount of the profit obtained by the dealer in the sale of the merchandise or service during the last five years or, if less than five, five times the annual average of the amount of the profit obtained during the last years, whatever they be.

* * * * * * * * * * *

Section 4.—The provisions of this act are of a public order and therefore the rights determined by such provisions can not be waived.

Section 5.—Every action arising from this act shall prescribe in three years reckoning from the date of the definitive termination of the dealer's contract.

Section 6.—If any clause, paragraph, article, section or part of this act is declared unconstitutional by a court of competent jurisdiction, said judgment shall not affect, impair or invalidate the rest of this act.

Section 7.—This act shall take effect immediately after its approval.

Approved June 14, 1964, as amended June 28, 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 541 and 543

No. 541

ARTURO FORNARIS, JR., *Appellant*,

v.

THE RIDGE TOOL CO., ET AL., and
THE COMMONWEALTH OF PUERTO RICO, *Appellees*.

No. 543

THE COMMONWEALTH OF PUERTO RICO, *Appellant*,

v.

THE RIDGE TOOL CO.,
THE RIDGE TOOL INTERNATIONAL CO., INC., and
ARTURO FORNARIS, JR., *Appellees*.

On Appeal from the United States Court of Appeals for the First Circuit

MOTION TO DISMISS OR AFFIRM

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FEDERAL STATUTES:

15 U.S.C. § 1, Sherman Act 22

15 U.S.C. §§ 1221-1225, Automobile Dealers' Day in Court Act 6, 7, 8, 9

28 U.S.C. § 1252 2

28 U.S.C. § 1254(2) 2, 3

28 U.S.C. § 1258 3

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 541 and 543

No. 541

ARTURO FORNARIS, JR., *Appellant*,

v.

THE RIDGE TOOL CO., ET AL., and
THE COMMONWEALTH OF PUERTO RICO, *Appellees*:

No. 543

THE COMMONWEALTH OF PUERTO RICO, *Appellant*,

v.

THE RIDGE TOOL CO.,
THE RIDGE TOOL INTERNATIONAL CO., INC., and
ARTURO FORNARIS, JR., *Appellees*.

On Appeal from the United States Court of Appeals for the First Circuit

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MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Appellees, Ridge Tool Co. and Ridge Tool International Co., Inc., pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeals herein or, in the alter-

native, to affirm the judgment of the United States Court of Appeals for the First Circuit, on the grounds that it is manifest that the questions are so unsubstantial as not to need further argument.*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 423 F. 2d 563 (1970). It is reprinted at page 31 of the Jurisdictional Statement of Appellant Fornaris and as Appendix A of the Jurisdictional Statement of Appellant The Commonwealth of Puerto Rico.

The unreported Memorandum and Order of the United States District Court for the District of Puerto Rico is reprinted at page 45 of the Jurisdictional Statement of Appellant Fornaris and as Appendix B of the Jurisdictional Statement of Appellant Puerto Rico.

JURISDICTION

These appeals must be dismissed for lack of jurisdiction. Both appeals concede that an appeal to the Supreme Court does not lie in this case by the terms of 28 U.S.C. § 1254 (2) or any other statute. Puerto Rico was apparently never intended by Congress to be regarded as a "State" for purposes of § 1254 (2).

The judicial code underwent complete revision in 1948. At that time § 1252 was revised to include specific mention of the Courts of record of Puerto Rico

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* This motion speaks to both appeals. Each appeal arises out of the same opinions below, and each raises materially identical legal questions. Therefore, Appellees, Ridge Tool Co., et al., believe that consideration by this Court will be simplified and ultimate termination of the litigation will be substantially advanced if Jurisdictional Statements in No. 541 and No. 543 are considered together.

in connection with appeals from invalidation of acts of Congress, C. 646, 62 Stat. 928, June 25, 1948. Congress in 1948 pointedly did not amend § 1254 (2) to provide for appeal to the Supreme Court by any party relying on a Puerto Rican Statute held unconstitutional by a court of appeals.

Congress declined in 1961 another opportunity to revise § 1254 (2). On August 30, 1961, Congress, in recognition of the changed status of Puerto Rico, passed Public Law 87-189, 75 Stat. 417 to amend Title 28 U.S.C. by adding a new § 1258 to provide direct review in the United States Supreme Court by *certiorari* or appeal of the decisions rendered by the Supreme Court of the Commonwealth of Puerto Rico. Neither in the Act itself nor in its legislative history (1961 U.S. Code Cong. and Adm. News, p. 2448), however, was there any hint of Congressional intention to include Puerto Rico within the meaning of "State" in § 1254 (2). In fact it was precisely because Puerto Rico, under its new status, was not a "State" that the 1961 amendment was needed.

Section 2 of Article 3 of the Constitution of the United States does not provide for appellate jurisdiction of the Court except as there specified. All cases not coming within the jurisdictional grant or expressly provided for by legislation are outside the Court's jurisdiction. *Durousseau* v. *United States,* 6 Cranch 307, 314 (1810).

QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit erred in holding unconstitutional the Dealers' Contract Law, Law 75 of the Laws of the Commonwealth of Puerto Rico?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Article I, Section 8, clause 3: "To regulate Commerce . . . among the several States . . ."

Article I, Section 10: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

Article IV, Section 3, clause 2: "The Congress shall have power to . . . make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."

Article VI, clause 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

Amendment V: ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV, Section 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Puerto Rican Statute:

Dealers' Contract Law, Law 75, 1964 Laws of Puerto Rico, 10 L.P.R.A. § 278, et seq., is reprinted as amended in 1965 and 1966 at page 62 of the Jurisdictional Statement of Appellant Fornaris and appears as amended in 1965 as Appendix D to the Jurisdictional Statement of Appellant Puerto Rico. The 1966 changes in the Law are not material to the case.

STATEMENT OF THE CASE

This case involves appeals from a decision of the United States Court of Appeals for the First Circuit holding invalid, as repugnant to the due process clause of the federal constitution, Law 75 of the Laws of the Commonwealth of Puerto Rico known as the Dealers' Contract Law.

The action below was initiated in the Superior Court of Puerto Rico, San Juan Part, on September 23, 1966, by Arturo Fornaris, Jr. against The Ridge Tool Co. and its subsidiary The Ridge Tool International Co., Inc.

The complaint alleged that a distribution contract between Fornaris and The Ridge Tool Company was terminated by it on April 15, 1966, in violation of Law 75.

The Ridge Tool Company caused removal of the case on diversity grounds in October 1966 to the United States District Court for the District of Puerto Rico. Ridge Tool moved to dismiss the Fornaris complaint on the ground that Law 75 was unconstitutional. The Commonwealth of Puerto Rico was permitted to intervene to defend the constitutionality of Law 15. On August 11, 1969, the District Court denied the motion to dismiss.

On appeal, pursuant to 28 U.S.C. § 1292(b), the United States Court of Appeals for the First Circuit held Law 75 to be invalid as violative of due process under the United States Constitution, vacating the judgment of the District Court. The instant appeals are from that decision of the First Circuit.

ARGUMENT [1]

I. INTRODUCTORY.

Before proceeding to a discussion of the constitutional principles which make it clear that there are no substantial questions requiring argument before this Court, it will be helpful to comment briefly on certain allegations made by Appellant Fornaris concerning the opinion of the First Circuit.

A. It is suggested by Appellant Fornaris that the Automobile Dealers' Day in Court Act,[2] has been placed under a "constitutional due process cloud" [3] by the First Circuit's opinion. The First Circuit, noting that proponents of Law 75 had invited a comparison with the Federal Act, listed the striking differences between the two. Those listed by the First Circuit, as well as others which are apparent from even a cursory comparison, may be summarized as follows:

1. The Federal Act was specifically intended for and limited to the subject of automobile distribution. Law 75 applies to every conceivable "distribution, agency, concession, or representation of a given merchandise or service".[4]

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[1] A study of both jurisdictional statements reveals that the Jurisdictional Statement of Appellant Fornaris not only embraces all the arguments advanced by The Commonwealth of Puerto Rico, but also offers additional matters for the Court's consideration. Accordingly, the Argument section of this motion, while addressed to both appeals, will respond specifically only to the Jurisdictional Statement of Appellant Fornaris. References to the Jurisdictional Statement of Appellant Fornaris will be designated "JSF p. —."

[2] 15 U.S.C. §§ 1221-1225.

[3] JSF p. 17.

[4] Law 75, § 1(a); 10 L.P.R.A. § 278(a).

2. The Federal Act is applicable to written contracts.[5] Law 75 is applicable to "dealer's contract[s]" defined as a "relationship established between a dealer and a principal . . . whereby . . . the former actually and effectively takes charge of the distribution of a merchandise, or of the rendering of a service, by concession of franchise on the market of Puerto Rico."[6] Hence, a manufacturer who may previously have had only a "working relationship with a local dealer, now under Law 75 has a nonterminable "dealer's contract".

3. The Federal Act does not impose new contractual obligations upon either of the parties, but simply prohibits them from acting in a coercive manner. Absent coercion, intimidation or threats thereof, the manufacturer under the Federal Act may avail himself of all of his rights under the franchise agreement including his right to cancel the contract upon expiration, even if his decision is arbitrary.[7] Law 75 effectively rewrites the termination provisions of all dealer contracts. Contracts formerly terminable on 30 days written notice by both parties may still be terminated on notice by the distributor,[8] but the manufacturer

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[5] 15 U.S.C. § 1221(b).

[6] Law 75, § 1(b); 10 L.P.R.A. § 278(b).

[7] *Berry Brothers Buick, Inc.* v. *General Motors Corp.*, 257 F. Supp. 542 (E.D.Pa. 1966), *aff'd per curiam*, 377 F.2d 552 (3d Cir. 1967).

[8] *Cf. Castillo* v. *Smart Products, Inc.*, 289 F.Supp. 138 (D.C.P.R. 1968) in which defendant in a Law 75 action counterclaimed alleging that the plaintiff distributor was responsible for termination of the distribution agreement and claiming damages. The Court dismissed defendant's counterclaim noting

> "The Court likewise finds and concludes that in rescinding the distributorship agreement without alleging cause or justification, and without any notice in advance to the defendant plaintiff did not incur in any breach of said agreement, which contained no provision on either of said two points."

may only terminate if the distributor has given "just cause", a term narrowly defined by Law 75.[9] Absent the "just cause" of the statute, he would be in violation of Law 75 regardless of the economic necessity for the termination and regardless of the absence of intimidation or coercion.

4. Damages under the Federal Act are compensatory.[10] The damages provision of Law 75 is almost penal in its harshness. The "good will" of the distribution business must in effect be paid for twice,[11] and no allowance is made for possible contributions made by the manufacturer (*e.g.*, use of his trademark, contributions to local advertising budgets, etc.) or even a prior dealer toward the creation of that good will.

In summary, the Federal Act starts with an existing written contractual relationship which it leaves unchanged but requires that the parties not act in a coercive manner towards each other, and provides for compensatory damages if there is a failure in that regard. Law 75 starts with as little as a working relationship, promotes this into a "dealer's contract," provides for its non-termination by the principal and finally provides for payment of an indemnity which bears little relation to compensation.

The First Circuit observed that any comparison of Law 75 with the Federal Act was "ill-taken" because "it is precisely to the extent that Law 75 departs from

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[9] "just cause: nonperformance of any of the essential obligations of the dealer's contract, on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service." Law 75, § 1(d); 10 L.P.R.A. § 278(d).

[10] 15 U.S.C. § 1222.

[11] Law 75, §§ 3(c) and (d); 10 L.P.R.A. §§ 278(b), (c) and (d).

the provisions of that statute that it is in difficulties."[12] The court concluded that:

> "Comparing Law 75 with the Federal Act in terms of retrospectivity is, in a sense, merely an intellectual exercise. The parties have cited no case holding even the Federal Act constitutionally retrospective. Non constat, in the light of the differences, that it might properly be so held had the question arisen. Law 75, however, cannot be."[13]

In the light of the First Circuit's express recognition that there are substantial differences between the two acts insofar as retrospectivity is concerned, it is inaccurate to charge that Court with casting a "constitutional due process cloud" over the Federal Act.

B. Secondly, the First Circuit is charged with:

> ". . . refusal to give more than lip service to the established police power of Puerto Rico to safeguard what it conceives to be the vital interests of its people and its economy. The court acknowledged but rejected the public purposes underlying the legislation penalizing arbitrary cancellation of franchises—the frustration of dealers' legitimate expectations and interests, the resulting instability of local investments and export of profits, and the loss of some business to Puerto Rico's detriment."[14]

This charge is patently wrong as a reading of the opinion will demonstrate. The court reviewed the purposes of the act in some detail "not only because it shows the purposes of the act, illuminating the propriety, or possibly, impropriety of its provisions, but

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[12] JSF p. 40.

[13] JSF p. 41.

[14] JSF p. 21.

also because of the assistance it may give in resolving doubts as to the statutory meaning." [15]

The First Circuit did nothing more or less than to pursue the lines of judicial inquiry demanded in any case in which a statute is challenged as, *inter alia*, offending due process. It concluded that the action of the legislature was beyond the scope of the police power because of the retrospective alteration of contract rights. And, in passing, it commented on the illogic of one aspect of the legislative history as follows:

> "... the Report of the Committee on Industry and Commerce to the effect that the termination of dealerships in terms revocable at will was 'frustrating the legitimate expectation' of the dealers cannot possibly be true. Dealers may have had hopes; they could have no legitimate expectation of non-terminable contracts. *Cf. Castillo* v. *Smart Products, Inc.*, D.P.R., 1968, 289 F. Supp. 138."

The cited case amply supports the First Circuit's view of the matter. As for the Report of the Committee on Industry and Labor,[16] it is difficult to escape the conclusion that the chief purpose from the outset was to grant to a small group of local distributors the right to maintain their status or to collect a substantial indemnity.

To characterize the First Circuit's analysis as only paying "lip service to the established police power of Puerto Rico" and a rejection of "the public purposes underlying the legislation" is unwarranted.

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[15] JSF pp. 34-35.

[16] This Report, appearing in JSF pp. 53-55, was quoted by the Superior Court of Puerto Rico in its opinion in the *Construction Machinery* case, which opinion was adopted by the District Court below, JSF p. 46.

II. LAW 75 IMPAIRS THE OBLIGATIONS OF CONTRACT AND DENIES DUE PROCESS.

This Court has always recognized that while the police power is extremely broad in scope, it is not absolute. There are constitutional limitations on its exercise.[17] The First Circuit correctly concluded that these limitations had been exceeded. Despite the obscurantist attack on the opinion below as involving a "'constitutional rearrangement" and "contract impairment and due process misconceptions" [18] it is clear that Law 75 is unconstitutional whether tested under the Contract Clause (because Puerto Rico is to be treated as a State) or the Due Process Clause of either the Fifth or the Fourteenth Amendment.[19]

Contract Clause

The limitation on the power of a State to impair the obligations of contract (protected under Article I, Section 10) was succinctly and clearly stated in *Home Building & Loan Assn.* v. *Blaisdell,* 390 U.S. 398, 431 (1934) as follows:

> "The obligations of a contract are impaired by a law which renders them invalid or releases or extinguishes them, and impairment . . . has been predicated of laws which without destroying con-

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[17] These limitations obviously apply to Congress when legislating for the District of Columbia, *Berman* v. *Parker,* 348 U.S. 26, 31-32 (1954), and *a fortiori* to Puerto Rico when legislating under its federally derived constitution.

[18] JSF pp. 19 and 21.

[19] Since the substantive content of the Due Process Clauses of the Fifth and Fourteenth Amendments are identical insofar as deprivation of property is concerned, *Nebbia* v. *New York,* 291 U.S. 502, 525, (1934) it is immaterial for due process purposes whether Puerto Rico is classified as a State or is otherwise classified.

tracts derogate from substantial contractual rights."

It is apparent from a mere inspection of Law 75 that, if it does not destroy the manufacturers contract, it "derogate[s] from substantial contractual rights."

Simply stated, prior to the enactment of Law 75 a manufacturer, who had entered into a contract with a dealer which reserved to either or both the unilateral right to terminate such contract, could exercise his termination rights unconditionally and without liability. Moreover, prior to Law 75, he could exercise his obvious right to decline to renew an expired contract with a dealer. In neither case was a manufacturer first required to establish "just cause." [20]

Subsequent to the passage of Law 75, the manufacturer's right to terminate or decline to renew can only be exercised with impunity if it passes muster under the statutory definition of "just cause." No longer is the manufacturer free to choose his representatives. Now when a dealer insists on retaining his status, the manufacturer must opt either to pay damages by way of settlement to avoid litigation or submit to litigation and assume the burden of showing "just cause" for the termination.

By any standard this constitutes a derogation of "substantial contractual rights" and is forbidden by Article I, Section 10. Where the validity of a retrospective statute is called into question this Court has weighed the public welfare it purports to serve against the unfairness created by its retrospective operation. *El Paso* v. *Simmons*, 379 U.S. 497 (1965); *Home Build-*

[20] See footnote 9, *supra*.

ing & Loan Association v. *Blaisdell, supra; Block* v. *Hirsh,* 256 U.S. 135 (1921). See also Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv. L. Rev. 692, 727 (1960).

In *El Paso* v. *Simmons, supra* at 509, this Court, quoting from *Ogden* v. *Saunders,* noted that

> "[i]t is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts."

The Court then examined in detail the historical background and economic considerations which led up to the 1941 amendments to the Texas law which were the subject of constitutional challenge and concluded at 513:

> "It was this situation to which the Texas Legislature addressed itself in 1941 and it is the light of this situation that we judge the validity of the amendment."

Balancing the public good against the private loss, the Court upheld the statute as designed to "restore confidence in the security and integrity of land titles, and to enable the State to protect and administer its property in a business-like manner" observing that the legislative "measure taken . . . was a mild one indeed." 379 U.S. 511-512.

And in *Block* v. *Hirsh, supra,* this Court noted the existence of "emergencies growing out of the war resulting in rental conditions in the District dangerous to the public health" which justified a rent control statute as a "regulation . . . justified only as a temporary measure . . . . A limit in time, to tide over a passing trouble, may well justify a law that could not

be upheld as a permanent change." 256 U.S. at 154, 157.

Similarly, in *Blaisdell, supra,* this Court cited "the economic emergency which threatened 'the loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence' " 290 U.S. at 444-445, and upheld a Minnesota mortgage moratorium statute finding not only that the statute afforded relief to mortgagees as well as mortgagors, but also that the "legislation is temporary in operation." 290 U.S. at 445-447.

None of the foregoing cases, nor any other case decided by this Court, support the contention of Appellant Fornaris that, in judging infractions of the Contract Clause "[t]he critical factor is thus not the factor extent of the impairment but the reasonableness or necessity of the exercise of state police power." [21] It is not true that the severity of the derogation wrought by Law 75 can be justified by either its economic objectives or the means adopted to achieve them. This Court made that perfectly clear in *El Paso, supra,* at 508-509. There, relying upon *Blaisdell, supra,* it observed that the reserve power of a State to modify the obligations of contract cannot be construed to destroy the limitations of the Contract Clause. Accordingly, the Court concluded, quoting from *Blaisdell, supra,* at 439:

> "They must be construed together. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."

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[21] JSF p. 23.

Following the principles announced in *Blaisdell*, the Court has never been deterred from invalidating well-intentioned police power legislation which transgressed the limitations of the Contract Clause. *W. B. Worthen Co.* v. *Thomas*, 292 U.S. 426 (1934); *W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935). In the latter case the Court stated: "Even when the public welfare is invoked as an excuse, these bounds must be respected." 295 U.S. at 60.

The First Circuit in considering Law 75 did nothing more than to follow the methodology employed by this Court in considering retrospective legislation. After considering *Blaisdell*, *El Paso*, and *Block* v. *Hirsh*, *supra*, and other cases, it concluded that Law 75 breached the outermost limits of those cases.

Due Process

Conceding to Puerto Rico the fullness of the police power that is enjoyed by the several States and by Congress in legislating for the District of Columbia, Law 75 is unconstitutional as a deprivation of property without due process of law.

It is clear that for due process purposes that "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States." *Lynch* v. *United States*, 292 U.S. 571, 579 (1934), *Thorpe* v. *Housing Authority*, 393 U.S. 268, 278, n. 31 (1969). And rights against the United States arising out of a contract with it are protected by Fifth Amendment against retrospective alteration. *Lynch*, *supra*, at 579. So also the Fifth Amendment protects contracts between private parties from unwarranted interference by Congress. As stated by the

Court in *Continental Illinois National Bank* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648, 680 (1935):

> "... as far back as Calder v. Bull, 3 Dall. 386, 388, it was said that among other acts which Congress could not pass without exceeding its authority was 'a law that destroys or impairs the lawful private contracts of citizens.' The broad reach of that statement has been restricted (Legal Tender Cases, 12 Wall. 457, 549-550); but the principle which it includes has never been repudiated, although the extent to which it may be carried has not been definitely fixed."

In the case of the several States, Article I, Section 10, standing alone, provides protection against impermissible retrospective alteration of private contracts and there is no need to resort to the Due Process Clause of the Fourteenth Amendment. *W. B. Worthen Co.* v. *Thomas, supra; W. B. Worthen Co.* v. *Kavanaugh, supra.*

This Court, however, has never considered the Due Process Clauses of the Fifth and Fourteenth Amendment and the Contract Clause as constitutional pigeonholes conceptually isolated from each other. For example, in *Thorpe* v. *Housing Authority of Durham, supra,* a Fifth Amendment due process case, this Court (393 U.S. at 278-280) called attention to its prior decisions in *Blaisdell* and *El Paso, supra,* both Contract Clause decisions. *Blaisdell* provided the reserve situation, where the question before the court was a Contract Clause matter, and this Court relied heavily upon *Block* v. *Hirsh, supra,* a Fifth Amendment due process case. In *Blaisdell,* after examining the pertinent issues and upholding the action of the State of Minnesota under the Contract Clause, this Court proceeded to overrule

the Fourteenth Amendment due process contention by noting at pp. 447-448:

> "What has been said on that point [the Contract Clause] is also applicable to the contention presented under the due process clause. *Block* v. *Hirsh*, 256 U.S. 135. . . ."

It is apparent from the foregoing that retrospectivity is a factor traditionally considered by this Court whether the alteration of contract rights is to be tested under the Fifth Amendment, the Fourteenth Amendment or the Contract Clause. It was unnecessary, therefore, for the First Circuit to determine whether Puerto Rico is properly subject to the due process clause of the Fifth or the Fourteenth Amendments. The result is the same in either case.

The suggestion of Appellant Fornaris[22] that *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963) and *Day-Brite Lighting Inc.*, 342 U.S. 421 (1952), permit the police power absolute sway, without regard to the severity of the impact resulting from retrospective legislation thus finds no support in the cases. Indeed, it is precisely the severity of retrospective impact which has led this court, in a Fourteenth Amendment due process case, to announce the principle that:

> "As long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, it must if not in all cases there must be an exercise of eminent domain and compensation to sustain

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[22] JSF p. 23.

> the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922).

No one would seriously argue that the statute involved in *Pennsylvania Coal Co.* v. *Mahon* did not meet the criteria announced in *Ferguson* v. *Skrupa* and *Day-Brite Lighting Inc.* v. *Missouri*. Nevertheless the statute which would have destroyed the coal company's reserved right to mine coal under land, the balance of which had been sold by it, worked a change of such great magnitude that it was felt that it was beyond the reach of the police power. It is submitted that neither *Ferguson* v. *Skrupa* nor *Day-Brite Lighting Inc.* v. *Missouri* has watered down or removed from the law the principle announced in *Pennsylvania Coal Co.* v. *Mahon*.

The First Circuit was dealing with "practical and substantial rights" with which "[t]he Constitution is concerned." *F.H.A.* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958). The Court concluded that "to convert a contractual relationship terminable by either party without cause into one which, short of breach by the other party, can be terminated by one of the parties only by making substantial payments and without protection for the other parties interests, is . . . a change of great magnitude."[23]

In so concluding its judgment is unassailable.

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[23] JSF p. 39.

III. LAW 75 PLACES AN UNDUE BURDEN UPON COMMERCE BETWEEN PUERTO RICO AND THE SEVERAL STATES.

Regardless of whether Puerto Rico is considered to be governed by the Commerce Clause[24] of the Federal Constitution or by the Territorial Clause,[25] it is a part of the federal system. Hence it is within the exclusive power of Congress to regulate commerce between Puerto Rico and the states to assure harmony within the federal system. The necessary concomitant of this premise is that Puerto Rico does not have the power to legislate in a manner which would unduly burden commerce between Puerto Rico and the several states. This, however, is exactly the effect of Law 75.

The burdens visited upon commerce by Law 75 are formidable. Substantial entry barriers are erected, directly violative of this Court's ruling in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). A manufacturer presently dealing through an exclusive distributor is effectively prevented from appointing another distributor, or entering the market himself; or even withdrawing from the market as his own business judgment may dictate. Even if confronted with primary line competition from another manufacturer not using an exclusive distributor, he would not be able to make the necessary adjustment to remain competitive without payment of a Law 75 indemnity.

Uniform regulation of interstate commerce is the only alternative to economic chaos in the federal system. The founding fathers recognized this principle

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[24] Article I, Section 8, Clause 3.

[25] Article IV, Section 3, Clause 2.

and this Court has consistently applied it. Puerto Rico, regardless of its exact legal status, is no less subject to this authority of Congress.

IV. LAW 75 IS NOT CONSISTENT WITH THE ANTITRUST LAWS AND POLICIES OF THE UNITED STATES AND MUST YIELD TO THE SUPREMACY CLAUSE OF THE CONSTITUTION.

Law 75 deprives a manufacturer of the control and flexibility it is entitled to exercise with respect to its distribution arrangements. The Court of Appeals aptly recognized that this statute makes a dealer's contract, with certain exceptions, "renewable indefinitely at the option of the dealer, and impose[s] substantial damages upon a manufacturer who refuse[s] to accede." [26] Thus, Law 75 operates to give existing dealers the power to exclude potential competitors and thus perpetuate indefinitely the *status quo*, whether it be a satisfactory distribution arrangement in terms of benefits to the public and the manufacturer, or not.

Such restrictions on the manufacturer run counter to United States antitrust laws and policy and, accordingly, Law 75 must yield to the Supremacy Clause of the Constitution.[27]

Repeatedly, where the courts have dealt with the question of whether and to what extent a manufacturer may select its customers, it has been held that the manufacturer has a fundamental right under the Sherman Act to choose its customers. *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). Accordingly, it may franchise as many or as few dealers as it wishes. The manufacturer may even grant exclusive dealerships,

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[26] JSF p. 32.

[27] Article VI, Clause 2.

providing the dealer with an exclusive territory and agreeing not to compete itself or locate another distributor in the assigned area. See *e.g., Schwing* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), aff'd. 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957). The courts also have recognized the manufacturer's concomitant right to substitute one dealer for another, *Scanlon* v. *Anheuser-Busch, Inc.*, 388 F.2d 918 (9th Cir. 1968), *cert. denied*, 391 U.S. 916 (1968); to appoint a number of competing dealers, *Industrial Building Materials, Inc.* v. *Interchemical Corp.*, 278 F. Supp. 938 (C.D. Cal. 1967); and to itself take over a distributor's dealership, *B & B Oil & Chemical Co.* v. *Franklin Oil*, 293 F. Supp. 1313 (E.D. Mich. 1968). The theory of these cases is that if manufacturers are deprived of flexibility to modify their vertical distribution programs and are required to preserve the presently existing structures, there is a "resultant definite, not fanciful, restraint on the freedom of competition," *B & B Oil & Chemical, supra*, at 319.

Law 75 does not recognize such rights and, in fact, clearly abridges them. It would require Appellee to adhere to its present arrangement with Appellant despite changes in Puerto Rico's economy or in Appellee's own particular business requirements, factors which would seem clearly to justify revisions of a manufacturer's distribution program.

This rigidity which Law 75 imposes on a manufacturer has the effect of providing territorial security and a resultant *de facto* monopoly for existing exclusive distributors in Puerto Rico because of the isolated nature of the island economy. The average consumer cannot readily go into another area to purchase the

products offered by such exclusive distributors, nor can a stateside manufacturer readily do business in Puerto Rico, except through a local representative. Thus, the consumer is captive to the existing arrangement. See *Galbraith & Holten, Marketing Efficiency in Puerto Rico,* Harvard University Press (1955) at pp. 194-96. The territorial security which Law 75 sanctifies is the very type which a manufacturer is forbidden to impose under the antitrust laws. Once the manufacturer has parted with title to its products, it is a *per se* violation of Section 1 of the Sherman Act[28] for it to attempt to restrict or confine its dealers with respect to areas in which its products may be sold. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Underlying this rule is the theory that "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress .... But even if that premise were open to question, the policy unequivocally laid down by the [Sherman] Act is competition." *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 4 (1958).

For the above reasons, Law 75, though "state action," is inconsistent with the antitrust laws and must yield to the Supremacy Clause of the Constitution. See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

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[28] 15 U.S.C. § 1.

V. THE DOCTRINE OF ABSTENTION IS INAPPLICABLE.

A. This case is governed by *Harman* v. *Forssenius*, 380 U.S. 528 (1965) wherein the Court said at 535:

> "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction."

No construction of Law 75 can "render unnecessary or substantially modify" the federal constitutional questions it raises.

It is apparent that Law 75 deprives a manufacturer of fundamental contract rights. Under Law 75 he may neither terminate nor decline to renew a contract with a dealer without "just cause." It is precisely this legislative conditioning of the right to terminate which raises the constitutional difficulties resolved by the First Circuit.

Law 75 is clear and unambiguous in its purpose to impose "just cause" as a condition of the exercise of termination rights. Contrary to the suggestion of Appellant Fornaris,[29] it would make no sense to require abstention on the chance that the Supreme Court of Puerto Rico could or would interpret Law 75 so as to eliminate "just cause" as a condition of the right to terminate. It is obvious that any such construction would be tantamount to repealing an essential part of the statute. This Court has refused to require abstention on the possibility that a state court would adopt an obviously strained construction. *Harman* v. *Forssen-*

[29] JSF p. 27 n. 18.

ius, Supra, at 536. Cf., *Davis* v. *Mann,* 377 U.S. 678, 691 (1964).[30]

Equally unconvincing is the suggestion that Law 75 might be construed by the Supreme Court of Puerto Rico as prospective and not retrospective. Not only would such an interpretation run exactly counter to the clear legislative intent, but the Supreme Court of Puerto Rico has already declined to adopt this view. On the same day the First Circuit decided the case below, the Supreme Court of Puerto Rico, in *McGregor-Doniger, Inc.* v. *Tribunal Superior de Puerto Rico,* 63 Colegio de Abogados (Case No. 0-69-159 decided on March 17, 1970),[31] reversed a decision of the Superior Court of Puerto Rico which had refused to stay proceedings under a Law 75 claim and give effect to an arbitration clause. In that case a contract of "employment" had been entered into containing a clause which provided that the parties would refer to arbitration in the State of New York any controversy or claim which might arise between them under the contract. The contract also provided that the appellee would dedicate himself to the promotion and sale of appellant's products in Puerto Rico, accepting responsibility for the distribution of the merchandise in Puerto Rico and a 4% commission for his efforts. The

[30] So also, any construction of "just cause" to expand its scope to include exculpating reasons for terminating a dealer's contract in addition to those specifically set forth in the statutory definition would not render Law 75 safe from constitutional challenge. See JSF p. 24 n. 17 (1) and opinion of Superior Court of Puerto Rico in *Construction Machinery & Supplies Corporation* v. *Construction Machinery Co.*, JSF p. 57. Any amelioration provided by a more expansive construction of "just cause" would still have the effect of conditioning the termination rights of the manufacturer.

[31] Reprinted as an Appendix hereto is an unofficial English translation of the opinion.

contract provided for cancellation on 30 days' notice. Thereafter the principal cancelled "due to changes which are now being made in our sales representation throughout the world," stating that "we regret that our efforts during the past season have not generated the sales volume that we both would have wished for."[32] In reversing the lower court, the Supreme Court of Puerto Rico said:

> "It is apparent from the pleadings that the cancellation of the contract in this case 'due to changes which we are now making in our sales representation throughout the world' is cause to cancel it since in the contract it was agreed that it could be cancelled by 30 days' written notice. But it is also clear that such cause or reason is not the 'just cause' which permits the termination of a distribution contract in accordance with the provisions of Law 75, supra.'"[33]

The court then stated in the footnote reference:

> "Art. 1 of Law 75 defines just cause as the breach of any of the essential obligations of the distributorship contract on the part of the distributor or any action or omission on his part which substantially and adversely affects the interest of the principal or grantor in the development of the market or distribution of the merchandise or service."[34]

Thus the Supreme Court of Puerto Rico declined to dispose of the case, as it easily could have, on the ground that Law 75 operates prospectively and not retrospectively. Instead, the court sent the case to arbitration to determine, among other questions, "if there was just cause to cancel [the contract] under Law 75."[35] In so

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[32] Appendix, p. 2a.

[33] Appendix, p. 6a.

[34] Appendix, p. 6a.

[35] Appendix, p. 6a.

doing the court made clear its view that the "just cause" which would excuse the contract cancellation is only the literal definition in the statute itself.

B. In support of its argument on abstention, Appellant suggests that the First Circuit rendered an "advisory opinion" in a "factual vacuum,"[36] and that it unnecessarily anticipated and decided a constitutional question.

Appellant cites *Electric Bond & Share Co.* v. *S.E.C.*, 303 U.S. 419 (1938) for the proposition that Chief Judge Aldrich improperly entered into a "speculative inquiry" and overturned as unconstitutional a statute "the effect of which in concrete situations, not yet developed, cannot now be definitely perceived."[37] In *Electric Bond & Share*, however, unlike the instant case, there was presented, in the words of the Court at 443, "a variety of hypothetical controversies which may never become real." The controversy which produced the instant litigation, on the other hand, is anything but hypothetical. Here, Appellant Fornaris brought suit against Appellee alleging that Appellee had terminated Appellant's 29-year distributorship contract; that the termination was without just cause and illegal in Puerto Rico; and that Appellant was entitled to indemnification of $175,000. Appellee's motion to dismiss put the constitutionality of Law 75 directly and unavoidably into question.

C. The prompt resolution of a matter of urgent public interest strongly militates against invoking the abstention doctrine. The proceedings in this case have been pending for more than four years. There are

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[36] JSF p. 28.

[37] JSF p. 29.

presently pending in the federal district court and the local courts over 60 cases involving alleged violation of Law 75. The aggregate of claims is conservatively $25 million. A remand of this case would mean additional delay of no less than four years in securing final decision by the Supreme Court of Puerto Rico. Additional time will be consumed in a rehearing of the federal questions by the federal courts including, perhaps, ultimate resort to this Court.[38] If this case is remanded, it and many others will be doomed to spend years in litigation before a final decision is reached.

CONCLUSION

WHEREFORE, Appellees Ridge Tool Company and Ridge Tool International Co., Inc., respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellees respectively move the Court to dismiss these appeals or, in the alternative, to affirm the judgment entered in the cause by the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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[38] See *England* v. *Louisiana State Board*, 375 U.S. 411 (1964).

APPENDIX

(Opinion No. 70-63)

IN THE SUPREME COURT OF PUERTO RICO

No. 0-67-159

McGREGOR-DONIGER, INC., *Petitioner*

v.

SUPERIOR COURT OF PUERTO RICO, SAN JUAN SECTION, HON. ARMINDO CADILLA GINORIO, Judge, *Defendant*

Opinion of the court written by associate judge RAMIREZ BAGES.

In San Juan, Puerto Rico, the 17th of March, 1970.

The petitioner cancelled its contract with the appellee. The contract was executed in 1959. Under its terms, the appellee agreed to promote and sell petitioner's products in Puerto Rico, in return for which he would receive a 4% commission on the net shipments. We must decide in this case whether to enforce the arbitration clause contained in the contract, calling for arbitration of any controversy arising as a result of the breach of same, or whether the rights of the parties are to be determined exclusively on the basis of Law # 75 approved by the Legislative Assembly of Puerto Rico, June 24, 1964 (10 L.P.R.A. secs. 278 and 278 a-d).

The complaint in this case alleged (1) that the parties executed, effective January 1, 1959, a contract, entitled an employment contract, by virtue of which the appellee agreed among other things, to dedicate himself to the sales and promotion of petitioner's products in Puerto Rico; to accept a 4% commission on net shipments as payment for his services; and assume full responsibility for the distribution of the merchandise in Puerto Rico. It was agreed that the contract would expire on the 31st of December, 1959, or before this date, by either party, upon written notice to the

other, sent by certified mail with 30 days prior notice. However, if when the contract expired, the "employer" was still rendering his services, the terms of the contract would apply to the continued employment; (2) that the contract is governed by the laws of New York and any controversy, or claim which arises from, or is related to said contract, or its breach, or to employment under the same, will be decided by arbitration in the City of New York according to the rules of the American Arbitration Association and any court with jurisdiction over the subject matter will render a verdict in accordance with the award; (3) said contract was cancelled by the defendant, effective January 7th, 1967 without having any justifying cause or motive. The cancellation letter states that said cancellation is "due to changes which are now being made in our sales representation throughout the world. . ." That "we regret that our efforts during the past season have not generated the sales volume that we both would have wished for. However, we appreciate the interest you have always shown in Mc Gregor"; (4) that the appellee increased the sale of petitioner's products from $75,000.00 before the contract to $192,000.00 in 1965; they fell to $130,000.00 in 1966 because sizable orders were not sent to a client; (b) That the petitioner refuses to pay to the appellee the sales commissions corresponding to 1967 and for the cancellation of the contract as required by law # 75, approved the 24th of June, 1964, and thus owes the appellee the sum of $43,365.60.

The petitioner denied (1) that the appellee was an exclusive agent and representative for the Puerto Rico territory under the contract; (2) that the appellee fulfilled all of his obligations diligently; (3) that the contract was cancelled without a cause or motive to justify such action; (4) that the appellee had increased sales in the amount claimed; and (5) the claim at issue. The petitioner alleged as special defenses that (a) the appellee agreed to act as an employee and therefore cannot claim under Law # 75 which was passed to protect distributors and not employees of manu-

facturing houses; (b) that the parties agreed to submit to arbitration any controversy arising under the contract; and (c) that the contractual relationship of the party should be governed by the laws of New York, as was stipulated in the contract; and (d) that Law # 75 is unconstitutional and so is its application to this case.

The petitioner submitted a motion to stay the proceedings, pending arbitration. The appellee objected because his cause of action was based on a violation of the provisions of Law # 75 and because arbitration in New York would be extremely onerous for him. The lower court held that Law # 376 of May 8, 1951 (32 L.P.R.A. sec. 3201) regulates the procedure for commercial arbitration in Puerto Rico, that said law does not authorize the court to order an arbitration proceeding outside this jurisdiction; that as the court cannot "order the celebration of arbitration proceedings in the state of New York, it would be unfair to paralyze the proceedings in this case". On reconsideration, the lower court re-affirmed its refusal to stay proceedings pending arbitration in view of the public policy contained in Law # 75 and because many state courts have refused to order arbitration in a jurisdiction different from the one of the forum, on the theory that a sovereign will not order its citizens to go before another sovereign to arbitrate their disputes.

The petitioner points out that the lower court erred in holding that because Law # 376, supra, does not authorize the court to order arbitration in New York, it would be unjust to stay the proceedings in this case.

In support of this position, the petitioner argues that in *Hilti, Inc.* v. *Oldach*, 392 F.2d 368 (CCA 1 1967), it was held that the proceedings in the United States District Court for Puerto Rico, in an action brought alleging the termination of a distributorship contract in violation of Low # 75 supra, were to be stayed pending arbitration in the state of Connecticut as provided for in the contract; that the power of the courts to order the proceedings

stayed pending arbitration is not based on the judicial authority to order arbitration in another jurisdiction; that the arbitration law that governs the controversy is the federal arbitration law as it is a transaction in interstate commerce. (9 U.S.C.A. secs. 1 and 2); that if the federal arbitration law does not apply, then the arbitration law of the state of New York applies as it was the one chosen by the parties; that the existing doctrines [are] to the effect that both the state and the federal courts have the authority to stay the proceedings until the parties have gone to arbitration in the agreed forum; that the argument that this would defeat public policy was rejected in *Hilti, Inc.*, supra.

The appellee argues that (1) this action does not arise from an interpretation of the contract at issue, but from its cancellation without just cause in violation of the provisions of law 75, supra; (2) due to the action of the petitioner, the contractual relationship between the parties has ceased, and therefore "Law #75 of 1964 as amended enters immediately with full force"; (3) that we are not bound by the decisions of the federal courts, because it is the courts of the Commonwealth of Puerto Rico who must interpret and give the necessary scope to the local law which governs the case; (4) neither the federal arbitration law nor Puerto Rico's forces a court to order arbitration outside its jurisdiction; (5) the petitioner answered the complaint, took appellee's depositions; used discovery of proof, and obtained permission to allege an additional defense; as a result of these acts, he renounced his right to arbitrate; that to hold arbitration in New York is extremely onerous for the appellee.

The petitioner alleges that its actions in this case cannot be interpreted as a waiver of its right to demand the agreed arbitration; indicates that according to *Tilti, Inc.*, supra, the courts have been reluctant to recognize a waiver of arbitration.

1—First we must decide whether the petitioner waived its right to arbitration. We conclude that it did not. The

burden of proving such a waiver falls on the appellee. There is a vigorous policy in favor of arbitration and a decided reluctance on the part of the courts to find that the right to arbitration has been waived. *Hilti, Inc.* supra. Any doubt that might exist must be decided in favor of arbitration. *Galt* v. *Libbey Owens Ford Glass Co.*, 376 F.2d 711 (CCA 7 1967).

It is alleged that the answering of the complaint, the alleging of special defenses, and the taking of depositions are acts inconsistent with the right to arbitration and therefore, such acts of active participation in the litigation constitutes a waiver of the right to arbitration.

This case is distinguishable from that of *Cornell & Company* v. *Barber & Ron Company*, 360 F.2d 512 (CCA Dist. of Co. 1966), in that in this latter case, arbitration was not invoked in the answer to the complaint, and many acts of participation, inconsistent with the right of arbitration, was carried out. *Gahon Iron Works & Mfg Co.* v. *J. D. Adam Co.*, 128 F.2d 411 (CCA 7 1942) is not applicable as there it was held that the plaintiff had waived his right to arbitrate by opting to litigate the issue in the courts.

The actions of the petitioner did not constitute a waiver of its right to arbitration because it invoked that right in its first pleading in the case, and requested a stay of the proceedings pending the arbitration which had been agreed to in the contract. Its subsequent actions were limited and not inconsistent with its original position of insistence on arbitration. *Hilti, Inc.* supra; *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402, 412 (CCA 2 1959) *Almacenes Fernandez, S.A.* v. *Golodeltz*, 148 F.2d 625, 627 (CCA 2 1945).

2—As the contract in issue involves a transaction in interstate commerce, its arbitration clause is governed by the Federal Arbitration Law. Said federal law authorizes the staying of proceedings in order that arbitration may proceed in accordance with the agreement (9 USCA Sec. 3)

Prima Paint Corp. v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1966). The Puerto Rico arbitration law contains an almost identical provision (32 L.P.R.A. Sec. 3203).

3—The fact that arbitration has been agreed to in another forum does not constitute an impediment to the staying of proceedings in a litigation until the issues in controversy have been arbitrated, in accordance with a previously stipulated arbitration agreement between the parties. *Hilti, Inc.* supra; *Gutierrez* v. *Union Pacific Railroad*, 372 F.2d 121 (CCA 10, 1966); *Armtorg Trading Corp.* v. *Camden Fiber Mills*, 109 N.E. 2d 606 (N.Y. 1952); *Shanferoke Coal & Supply Corp.* v. *Westchester S. Corp.*, 70 F.2d 297 (CCA 2 1934).

It is apparent from the pleadings that the cancellation of the contract in this case "due to changes we are now making in our sales representation throughout the world" is cause to cancel it, since in the contract it was agreed that it could be cancelled by 30 days written notice. But it is also clear that such cause or reason is not the "just cause" which permits the cancellation of a distributorship contract in accordance with the provisions of Law # 75 *supra*.[1]

However, according to the federal arbitration law the proceedings in this case shall be stayed until by the arbitration agreed to by the parties the following has been determined: (1) the nature and efficacy of the contract in question; (2) the relationship of the parties under the contract; (3) if there was just cause to cancel same under Law # 75; (4) if the commissions alleged in fact 4 of the complaint are owed; (5) any other controversy that has arisen and is pending between the parties and the said contract.

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[1] Art. 1 of Law #75 defines just cause as the breach of any of the essential obligations of the distributorship contract on the part of the distributor or any action or omission on his part which substantially and adversely affects the interest of the principal or grantor in the development of the market or distribution of the merchandise or service.

It must be understood, however, that upon the conclusion of said arbitration, the proceedings in this case may be continued in form and manner not inconsistent with the arbitration award, determining at the outset the applicability of Law #75 to the contract in question, as well as its constitutionality.

Therefore, the resolutions of the Superior Court, San Juan Section, of October 2, 1968 and June 24, 1969 must be and are revoked and the proceedings in the case ordered suspended until the arbitration agreed to in the contract in question has taken place.

Signed/ MARIANO H. RAMIREZ BAGES
Associate Judge

Judgment

San Juan, Puerto Rico the 17th of March, 1970.

For the reasons stated in the above opinion, the resolutions of the Superior Court, San Juan Section, dated the 2nd of October, 1968, and the 24th of June, 1969 are hereby revoked and the suspension of the proceedings of this case is hereby ordered until the arbitration in accordance with the contract in question has taken place.

So held and ordered by the Court and certified by the Secretary. The Chief Judge and the Associate Judge Mr. Hernández Matos, did not intervene. The Associate Judges Messrs. Santana Becerra & Dávila concur in the result without opinion.

JOAQUIN BERRIOS—*Secretary*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 541

ARTURO FORNARIS, JR.,
Appellant,

v.

THE RIDGE TOOL CO., *et al.*,

and

THE COMMONWEALTH OF PUERTO RICO,
Appellees.

On Appeal from the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The motion of the Ridge Tool Company to dismiss or affirm this appeal in no way detracts from the substantiality of the questions presented or from the appropriateness and indeed the need of some affirmative action by this Court. That fact is apparent from the arguments advanced in that motion, arguments as to which only the following need be said:

1. **The incomplete record dictates abstention from resolving the constitutionality of the Dealer's Act until more facts are developed.**

The motion to dismiss or affirm (p. 26) acknowledges that the record here consists of nothing more than (1) a complaint "alleging that Appellee had terminated Appellant's 29-year distributorship contract; that the termination was without just cause and illegal in Puerto Rico; and that Appellant was entitled to indemnification of $175,000," and (2) a motion to dismiss that "put the constitutionality of Law 75 directly and unavoidably into question."[1]

Thus there is present at this juncture one of those "hypothetical controversies which may never become real," *Electric Bond & Share Co. v. S.E.C.*, 303 U.S. 419, 443 (1938), and which this Court has consistently held to be outside the realm of constitutional adjudication. No facts have been proved or conceded. There is not even a sketchy "Agreed Statement of Facts" of the type which had been held to constitute too "fragile a record" to permit adjudication of "matters of serious public concern." *Public Affairs Press v. Rickover*, 369 U.S. 111 (1962). Until more facts have been explored and developed, there is here nothing more than a hypothetical controversy swirling about facts that are unknown or that may never come into existence.

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[1] The Statement of the Case in the motion to dismiss or affirm (p. 5) is understandably short and is able to point only to the following facts as pertinent to the adjudication below:

> "The complaint alleged that a distribution contract between Fornaris and The Ridge Tool Company was terminated by it on April 15, 1966, in violation of Law 75 . . . . Ridge Tool moved to dismiss the Fornaris complaint on the ground that Law 75 was unconstitutional."

In other words, the Puerto Rican Dealer's Act has been invalidated by the First Circuit upon the unproved hypotheses that (1) there was an otherwise valid franchise agreement terminable at will; (2) there was a termination that in fact was without "just cause," thus bringing the Dealer's Act into operation; (3) the appellant Fornaris was entitled to recover damages suffered by reason of the termination; and (4) the appellee Ridge Tool Co. had no defense to the suit other than the alleged invalidity of the Dealer's Act. One or more of those four critical factors may never become a reality; and until all four of them are realized, the factual situation must be considered hypothetical for purposes of constitutional adjudication.[2]

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[2]See *McGregor-Doniger, Inc. v. Tribunal Superior de Puerto Rico*, 63 Colegio de Abogados (Case No. 0-69-159), reprinted in the appendix to the Appellee's motion to dismiss or affirm. In that case the Supreme Court of Puerto Rico was met with a contested claim that a distributorship contract, containing an arbitration clause, had been unjustly terminated in violation of the Dealer's Act. The Supreme Court stayed further proceedings pending arbitration to determine the following critical facts (Mot. App. 6a):

> "(1) the nature and efficacy of the contract in question; (2) the relationship of the parties under the contract; (3) if there was just cause to cancel same under Law #75; (4) if the commissions alleged in fact 4 of the complaint are owed; (5) any other controversy that has arisen and is pending between the parties and the said contract."

Only after these facts had been determined, facts which are also absent from the instant case, could the Puerto Rican court then determine "the applicability of Law #75 to the contract in question, as well as its constitutionality." Mot. App. 7a.

The statements from the opinion respecting the "just cause" provision of Law #75, quoted at p. 25 of the motion to dismiss or affirm, are plainly dicta. The only point decided was the necessity of arbitration to discover the essential facts.

An overt example of the First Circuit's resort to assumptions as a substitute for established facts is to be found in its opinion. Jurisdictional statement appendix, p. 33. There being no evidence or allegation that the termination was or was not contrary to the terms of the contract, the court was forced to say that "*we assume* that it was in accordance therewith, and that plaintiff's rights depend solely upon Law 75." (Emphasis added). On that unproved factual assumption rested in large part the court's ensuing constitutional analysis and application.

This, then, is a classic instance where a federal court should have abstained from testing the constitutional validity of a local statute. To perform such a test at this juncture, where there is no proof or assurance as to the controlling facts or as to the applicability of the statute to such facts, is to engage in an advisory opinion without benefit of an actual or matured case or controversy. On that basis alone, the First Circuit's judgment in this case cannot stand. Corrective action by this Court thus becomes appropriate.[3]

2. Abstention is further warranted in the absence of an authoritative construction of the Dealer's Act by the Puerto Rico Supreme Court.

The basic error of the First Circuit, the error that led to that court's misapprehension of applicable constitutional doctrines, was its attempt to read the Dealer's Act and to assess the statute's validity without sufficient facts before the court. Without such facts, it was

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[3] For a comprehensive statement of the conditions under which this Court, and indeed any federal court, should indulge in constitutional adjudication, see Mr. Justice Brandeis' opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-348 (1936).

impossible to know precisely which sections of the statute were applicable and hence were ripe for interpretation and constitutional assessment. And that basic error was compounded by the First Circuit's refusal to abstain from construing and assessing the Act until the Supreme Court of Puerto Rico could give the statute, or its relevant sections, an authoritative construction.

The motion to dismiss or affirm merely says (p. 23) that the language and purpose of the Dealer's Act are so clear and unambiguous as to make abstention unnecessary and inapplicable; any different construction that the Supreme Court of Puerto Rico might adopt is denominated as "obviously strained" and "tantamount" to repeal of the statute. But such a thesis is an exercise in futility. Until one knows precisely the facts to which a new statute, or parts thereof, is to be applied, one cannot have the assurance that constitutional adjudication demands—i.e., the assurance that particular statutory provisions and particular interpretations thereof are necessarily brought into focus by the facts. And many statutory concepts, such as the "just cause" and the indemnification concepts of the Dealer's Act, acquire much of their meaning when viewed in the context of the specific facts to which they are to be applied.

For example, the Supreme Court of Puerto Rico has consistently viewed the "just cause" concept, as it appears in other Puerto Rican statutes, as deriving meaning "in accordance with the facts of each case brought before its consideration" and as not necessarily being limited to the stated legislative definitions. See cases cited in *Construction Machinery & Supplies Corp. v. Construction Machinery Co.*, (Superior Ct. P.R., 1968), at p. 57 of the appendix to the jurisdictional statement herein. And such a statutory concept "should further be supplemented, when a case may merit it, with statutory precepts drawn from other laws of the

State." *Ibid.* Additional aid may come from various principles of the civil law of Puerto Rico.

Thus when the Appellee repeats (motion, p. 8) the First Circuit's hasty conclusion that the Dealer's Act contains no provision for mitigation of damages, completely overlooked is the strong possibility that the damage provision of the Act would be interpreted by the Supreme Court of Puerto Rico in the light of Article 1056 of the Civil Code of Puerto Rico (1 L.P.R.A. §3020) which provides that damages may be mitigated in all types of civil actions.[4]

Enough has been said to demonstrate that the First Circuit's wide-ranging interpretations of various sections of the Dealer's Act lack the requisite trustworthiness, particularly since those interpretations were rendered without reference to proven facts.[5] The Act simply cannot be read intelligently, moreover, unless viewed in the context of other Puerto Rican statutory law and civil law concepts. By reason of these circumstances, combined with the respect due the Commonwealth of Puerto Rico, abstention should have been decreed by the First Circuit.

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[4]See also the comment of the Superior Court in the *Construction Machinery* case: "In connection with the damages contemplated by Section 278b of the law (Title 10 L.P.R.A.), we are of the opinion that the same does not limit the power of the Court to indemnify a distributor upon the basis of the factors set forth in the said section." Jurisdictional statement appendix, pp. 60-61.

[5]In the *Construction Machinery* case, the Superior Court said "that Law No. 75 is one which should be interpreted case by case and that only after the presentation of the whole evidence will the Court be in a position to determine whether there was an impairment of the existing relationship, or if there was a unjustified refusal to renew a contract or if a contract was terminated without just cause." Jurisdictional statement appendix, p. 60.

It need only be added that the pendency of this case for four years (motion, p. 26) is no argument against application of the abstention doctrine. Most of those years were consumed by awaiting the action of the First Circuit on other appeals, which became aborted. See jurisdictional statement, pp. 6-7. Prompt action by the Supreme Court of Puerto Rico can be anticipated when this or other similar cases already pending in the Puerto Rican courts are brought to its attention. Many of the latter cases already have fully developed fact situations.

3. The Appellee's arguments relative to the Commerce Clause and the antitrust laws cannot be entertained by this Court in support of the decision below.

The motion to dismiss or affirm (Parts III and IV, pp. 19-22) renews certain arguments made by the Appellee in the First Circuit, but ignored by that court in rendering the judgment in question. Those arguments involve allegations that the Dealer's Act unduly burdens interstate commerce and is inconsistent with the federal antitrust laws.

But those arguments can serve neither to support the decision below nor to justify this Court's avoidance of review of that decision. The First Circuit invalidated the Dealer's Act solely by reference to concepts thought to be embodied in the Contract and Due Process Clauses of the Constitution. And this Court's review of that First Circuit judgment should be premised solely on an assessment of the substantiality and correctness of the constitutional conclusions actually drawn by the First Circuit. It would be an intolerable situation, if the constitutional concepts utilized by the First Circuit be thought to be improper or inadequate, to allow the erroneous judgment of constitutional invalidity to stand unreviewed and uncorrected simply because other con-

stitutional contentions might have been properly utilized to produce the same result. The respect due the Commonwealth of Puerto Rico, or any sovereign State, dictates that a federal court judgment striking down one of its statutes be structured on something more substantial than constitutional concepts that might have been but were not used.

In *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940), this Court made clear that, in a case coming from a state court where a state statute has been held invalid on an erroneous construction of the Constitution, this Court will not entertain other grounds of attack on the statute that were not raised *or decided* in the state court. The fact that a local statute has been invalidated by a federal appellate court rather than a state court should not make this *McGoldrick* rule any less applicable. Whether rendered by state or federal courts, "their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds . . . which, in the course of proceedings there, have been abandoned." 309 U.S. at 435.

4. The First Circuit's invalidation of the Dealer's Act by use of contract impairment and due process concepts is unwarranted.

The motion to dismiss or affirm (pp. 6-18) raises more questions than it settles respecting the advisory opinion of the First Circuit. While many of the arguments advanced in the motion are academic by virtue of the absence of proven facts, a few comments may be appropriate:

(1) Any court opinion that is uncertain as to which of three constitutional provisions operates to outlaw a legislative enactment is likely to result in constitu-

tional and practical confusion. The First Circuit's opinion is no exception.

For example, to the extent that the court invalidated the Dealer's Act by importing contract impairment concepts into the Due Process Clause of the Fifth Amendment, the decision has most serious implications with respect to Congressional power. Indeed, the decision in that respect brings into constitutional question the federal Automobile Dealers' Day in Court Act. That statute, despite Appellee's protestations (motion, pp. 7-9), coincides with the Puerto Rican law to the extent that both enactments penalize terminations marked by coercion, intimidations or threats. Under the ruling below, the federal statute could be considered invalid under the Fifth Amendment as interfering with the automobile manufacturer's asserted right to terminate "unconditionally and without liability" (motion, p. 12).

(2) One of questionable assumptions underlying the opinion of the first Circuit, an assumption running throughout the Appellee's motion, is that the Dealer's Act can be construed to constitute an impairment of contracts in a retroactive and unconstitutional sense. Even if there were a record here showing a contract terminable at the will of the manufacturer, it is doubtful if a statute providing indemnification for the unjust exercise of an arbitrary termination right can properly be said to interfere with a substantive or substantial obligation of the contract. Providing such indemnification may be said to be a mere alteration of the remedies available under the contract, as to which States are free to legislate in the public interest without limitation by the Contract Clause. See, e.g., *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 128 (1937). And, since such legislation provides for an alteration in the remedy only where an unjust termination occurs *after* the enactment of the statute, it may be

doubted whether the statute—as applied to such a factual situation—is retroactive in any sense of that word.

(3) Finally, even if the Dealer's Act, as applied to a proved set of facts, were construed as impairing a contract obligation, the conclusive answer to the constitutional objections of the First Circuit is to be found in the cardinal principle that has been stated and restated by this Court—that not all impairments are outlawed by the Contract Clause, which recognizes that "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Building Loan Assn. v. Blaisdell*, 290 U.S. 398, 434 (1934); *El Paso v. Simmons*, 379 U.S. 497, 508 (1965). In short, both the contract impairment and the due process concepts of the Constitution recognize that certain invasions of private contract rights may be justified in the public interest. Such is the case here.

CONCLUSION

For these various reasons, supplementing those in the jurisdictional statement, appropriate action should be taken by this Court to vacate or reverse the judgment below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 543

THE COMMONWEALTH OF PUERTO RICO, *Appellant*,

v.

THE RIDGE TOOL CO.,
THE RIDGE TOOL INTERNATIONAL CO., INC.,
and
ARTURO FORNARIS, JR., *Appellees*.

On Appeal From the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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On Appeal From the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The Motion to Dismiss or Affirm submitted by the Appellees, The Ridge Tool Co. and The Ridge Tool International Co., Inc., has added nothing which alters the substantiality of the questions presented or

diminishes the need for action by this Court to reverse the judgment below. However, a few comments are in order regarding new points contained in the Motion which only obscure the central issues.

1. The Commerce Clause Is No Bar to Law 75

The Appellees mention allegedly formidable "burdens visited upon Commerce by Law 75."[1] The Commonwealth of Puerto Rico submits that no such burdens are created by Law 75, either through the erection of "[s]ubstantial entry barriers"[2] or otherwise, but there are other compelling reasons why this Court should disregard the Appellees' Commerce Clause argument.

First, the decision below does not rest on this ground, and it would be inappropriate for this Court to avoid review of an erroneous constitutional decision merely because it felt other constitutional grounds supported the result.

Second, certain questions regarding the precise applicability of the Commerce Clause to the Commonwealth of Puerto Rico remain unclear and need not—and therefore should not—be decided here. Prior to the federal legislation which led to the compact between the United States and Puerto Rico, the constitutional restrictions with respect to regulation of interstate commerce[3] were held not to apply to Puerto Rico in *Buscaglia* v. *Ballester*, 168 F. 2d 805 (1st Cir.

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[1] Appellees' Motion to Dismiss or Affirm, p. 19. Subsequent references to the Motion to Dismiss or Affirm will be designated "Motion, p. —."

[2] Motion, p. 19.

[3] Article I, Section 8, Clause 3.

1947); *cert. den.*, 332 U.S. 816 (1947). Puerto Rico is no longer a territory, having since required commonwealth status, but no case has invalidated the principle set forth in *Buscaglia*. Whatever the ultimate answer, it is fair to say that the question cannot be disposed of as simplistically as the Appellees attempt to do[4] and should not be in issue here.

2. Law 75 Does Not Conflict With Federal Antitrust Laws

This Court should also disregard Appellees' antitrust-Supremacy Clause argument because the decision below does not rest on this basis, but the argument falls of its own weight in any event. The Appellees, citing a number of cases, urge upon this Court the proposition that certain business practices, if permitted under the antitrust laws, cannot be restricted by legislation of the Commonwealth of Puerto Rico.

Any contention in this regard, as a challenge to "state" action, should fall by virtue of *Parker* v. *Brown*, 317 U.S. 341 (1943), but the Appellees present a case even more tenuous than this Court faced in *Parker*. They are not contending that "state" action has resulted in an alleged violation of the federal antitrust laws, but rather that any law which controls or restricts business conduct that has been held *permissible* under the federal antitrust law is necessarily in conflict with federal antitrust policy and must fall by virtue of the Supremacy Clause.

Appellees thus misrepresent the basic thrust of the federal antitrust laws which are designed to prohibit certain conduct which has been found—legislatively—to be contrary to public policy. However, conduct

[4] Motion, p. 19.

which is found—by the courts—to fall outside the Congressional prohibitions does not thereby attain some special status, immune from all non-federal interference. Such an argument completely ignores, or attempts to obscure, the basic difference between antitrust and other laws. It is interesting, however, to find that one of the cases cited by Appellees clearly recognizes the difference. *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F.Supp. 899 (D. Md. 1956), has been cited for the proposition that "[t]he manufacturer may even grant exclusive dealerships, providing the dealer with an exclusive territory and agreeing not to compete itself or locate another distributor in the assigned area."[5] In *Schwing* the plaintiffs sued on the basis of an alleged violation of the antitrust laws. Although the complaints were dismissed as not stating a cause of action under the antitrust laws, Judge Thomsen said that the plaintiffs had "alleged facts which would support claims against Hudson for breach of contract." (at p. 902) The court thus recognized the basic distinction between antitrust and other laws and gave no indication—although the opportunity certainly presented itself—that any breach-of-contract action would be precluded because the acts alleged did not constitute a violation of, and were thus permissible under, the antitrust laws.

3. Abstention Remains Appropriate

The Appellees have quoted some language from *Harman* v. *Forssenius*, 380 U.S. 582 (1965), which, taken out of context, appears most persuasive.[6] An examination of that case, however, indicates quite clearly why

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[5] Motion, pp 20-21.

[6] Motion, p. 23.

abstention was improper. The issue was the validity of a Virginia voter requirement statute under the new Twenty-Fourth Amendment to the Constitution. In determining the abstention issue, this Court looked to the "nature of the constitutional deprivation" and "the probable consequences of abstaining," (at p. 537) finding that the right involved—the right to vote—was, quoting *Reynolds* v. *Sims*, 377 U.S. 533, the essence of a democratic society. (*Ibid.*) It was concluded that abstention was improper because the federal courts were "faced with a claimed impairment of the fundamental civil rights of a broad class of citizens." (*Ibid.*) In addition, immediate action was needed because of the impending cut-off date for meeting the residency requirement to vote in the upcoming election. In passing upon the validity of the statute, this Court also noted that it was clear and unambiguous in all material respects (at p. 535) and that Virginia had not pointed to any provision which could have been construed in any way to be constitutional.

Harman v. *Forssenius* is clearly distinguishable and not controlling because the right abridged by the legislation in question was of a preferred order, immediate action was obviously necessary, and—on the substantive issue—this Court was unable to conceive of any possible construction of the statute which would pass the test of constitutionality. In this case, on the other hand, the courts are faced with the claimed impairment of a right which certainly cannot be equated with the right to vote, and Appellees have made no convincing showing that expeditious federal determination of the Law 75 issues is required in the public interest. Furthermore, there are quite clearly a number of constructions of Law 75 which could eliminate any Federal Con-

stitutional questions, and, in disposing of the Motion to Dismiss or Affirm, this Court is not limited to consideration of the two possible constructions criticized by Appellees.[7]

Abstention is further supported in this case by the First Circuit's complete disregard, and perhaps ignorance, of civil law concepts and their relationship to Law 75. The assumptions made by the court as to the operation and effect of Law 75 clearly indicate this lack of sensitivity and awareness.[8] This reply is not the place to detail all of the specific civil law concepts which relate to distributorship contracts and to Law 75, but a few—by way of example only—are good faith,[9] abuse of right[10] and mitigation of damages.[11] In view of these and many other doctrines which might affect the ultimate operation of Law 75, the Supreme Court of Puerto Rico should be given an opportunity to con-

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[7] Motion, pp 23-24.

[8] Jurisdictional Statement, Appendix A, pp 1a-11a.

[9] Article 88 of the Puerto Rico Commercial Code, 10 L.P.R. Annot. § 1308, provides that commercial contracts shall be executed and complied with in good faith and Article 1207 of the Puerto Rico Civil Code, 31 L.P.R. Annot. § 3372 voids obligations contrary to law. See also, Powell, R., "Good Faith in Contracts," 1956 Current Legal Problems 16; Rosenberg, G.A., "The Notion of Good Faith in the Civil Law of Quebec," 7 McGill L.J. 2 (1960).

[10] The doctrine of abuse of right is not generally known in common law but is a well accepted concept of civil law. It recognizes that there is a definite need to resolve the conflicts which arise when someone is aggrieved by another who has acted in the exercise of a purported legal right. See, Bruteau, P., II *Civil Law Fundamental Principles* 674; Angus, D., "Abuse of Rights in Contractual matters in the Province of Quebec," 8 McGill L.J. 150 (1961).

[11] Article 1056 of the Civil Code of Puerto Rico, 1 L.P.R. Annot. § 3020.

strue Law 75 in the first instance. Then perhaps—but certainly not before—the federal courts might have the background and foundation necessary for an informed judgment as to Law 75's validity under the United States Constitution.

The citation of *McGregor-Doniger, Inc.* v. *Tribunal Superior de Puerto Rico*[12] is meaningless. The precise question before the Supreme Court of Puerto Rico was whether the case was to proceed to arbitration and whether lower court proceedings should, therefore, be stayed in the interim. The fact that the court did not render an advisory opinion favorable to Appellees' position cannot be material here.

WHEREFORE, the Commonwealth of Puerto Rico requests that this Court deny Appellees' Motion and proceed with whatever steps are deemed necessary to reverse the judgment below.

Respectfully submitted,

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[12] Motion, p. 24 and Appendix pp 1a-7a.

SUPREME COURT OF THE UNITED STATES

October Term, 1970

FORNARIS *v.* THE RIDGE TOOL CO. ET AL.[1]

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 541. Decided November 23, 1970

PER CURIAM.

In 1964 by Act No. 75, the Legislature of Puerto Rico enacted the Dealer's Contract Law which in effect provides that a Puerto Rican dealer's contract with a manufacturer, regardless of any provisions for termination, is renewable indefinitely at the option of the local dealer unless the manufacturer has "just cause" to terminate. Section 1 (d) defines "just cause" as "nonperformance of any of the essential obligations of the dealer's contract, on the part of the dealer, or any action or omission on his part that adversely and substantially affects the interests of the principal or grantor in promoting the marketing or distribution of the merchandise or service." If a manufacturer terminates for any other reason he is liable for substantial damages.

This case was brought by a dealer in a Puerto Rican court for damages for breach of his distributorship contract against Ridge Tool Co., an appellee. It was removed to the Federal District Court on the basis of diversity of citizenship. That court denied the motion to dismiss which claimed that the Dealers Contract Law upon which the complaint was based was unconstitutional. The Court of Appeals allowed an interlocutory appeal and held the Dealers Contract Law unconstitutional. 423 F. 2d 363.[2]

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[1] Together with No. 543, *Puerto Rico v. The Ridge Tool Co. et al.*

[2] Appellant invoked 28 U. S. C. § 1254 (2) as the authority for these appeals. That provision provides that a judgment in the Court of Appeals may be brought here "By appeal by a party

The relations of the federal courts to Puerto Rico have often raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal courts, reversing Puerto Rican courts, were inclined to construe Puerto Rican laws in the Anglo-Saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this Court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be "inescapably wrong." See *Bonet* v. *Texas Co.*, 308 U. S. 463, 471.

The question presented here is akin to that question, for we deal with a rather vague Puerto Rican law that the Supreme Court of Puerto Rico has not authoritatively

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relying on a *state* statute held by a court of appeals to be invalid as repugnant to the Constitution . . . ." But a Puerto Rican statute is not a "*state* statute" within § 1254 (2). It is true that statutes enacted in 1961 require that this Court treat the Puerto Rican courts as the equivalent of state courts for purposes of appeal and certiorari. 75 Stat. 417, 28 U. S. C. § 1258 expressly provides that "Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico" may be reviewed by this Court by appeal or by writ of certiorari in the situations where those routes are available for review of the judgments of the highest courts of the States. Significantly, however, no parallel provision was added to § 1254 (2) to permit appeals here from the courts of appeals by a party relying on a Puerto Rican statute. Whether the omission was by accident or by design, our practice of strict construction of statutes authorizing appeals dictates that we not give an expansive interpretation to the word "State." We see no merit in the argument that we have already done so in our Rule 61 defining "state court" to include the Puerto Rican Supreme Court and "law and statutes of a state" to include "the law and statutes of the Commonwealth of Puerto Rico." That rule was adopted only to implement 28 U. S. C. § 1258 dealing with review by appeal or certiorari with final judgments of the Supreme Court of Puerto Rico. We therefore hold that the appeals are improper and accordingly we treat the jurisdictional statements as petitions for writs of certiorari and grant them on that basis. 28 U. S. C. § 2103; *El Paso* v. *Simmons*, 379 U. S. 497, 501–503.

construed.[3] Only last Term in *Reetz* v. *Bozanich*, 397 U. S. 82, we held that a three-judge federal court should not have proceeded to strike down an Alaska law which, if construed by the Alaska Supreme Court, might be so confined as not to have any constitutional infirmity. We said, "A state court decision here . . . could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship." *Id.*, at 86–87.

In this case the Court of Appeals held that "just cause" placed substantial liability on a manufacturer who had contracts that he could have terminated without liability prior to the new statute. This retrospective impact, the Court held, violated "the due process clause of the federal constitution"—without saying whether the Fifth or the Fourteenth Amendment was involved.[4] 423 F. 2d, at 566–567.

Whether the Supreme Court of Puerto Rico would give the same broad sweep to "just cause" as did the Court of Appeals is something we do not know. It is conceivable that "just cause" might be judicially confined to a more narrow ambit which would avoid all

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[3] In *McGregor-Donyer Inc.* v. *Superior Court*, decided March 17, 1970, the Supreme Court referred briefly to the "just cause" provision in the Act:

"It is apparent from the pleadings that the cancellation of the contract in this case 'due to changes we are now making in our sales representation throughout the world' is cause to cancel it, since in the contract it was agreed that it could be cancelled by 30 days' written notice. But it is also clear that such cause or reason is not the 'just cause' which permits the cancellation of a distributorship contract in accordance with the provisions of Law #75, *supra*."

[4] Art. II, § 7, of the Constitution of Puerto Rico provides that "No person shall be deprived of his liberty or property without due process of law," "life" being excluded because § 7 abolishes the death penalty. That Constitution was approved by Congress. See H. R. Rep. No. 1832, 82d Cong., 2d Sess.; H. R. Rep. No. 2350, 82d Cong., 2d Sess.; S. Rep. No. 1720, 82d Cong., 2d Sess.

constitutional questions. We therefore reverse and direct the Court of Appeals to remand the case to the District Court with instructions to hold its hand until the Puerto Rican Supreme Court has authoritatively ruled on the local-law question [5] in light of the federal claims. See *England* v. *Medical Examiners*, 375 U. S. 411, 420.

It is so ordered.

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[5] Under Puerto Rico's laws its courts have broad powers "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." 32 L. Puerto Rico, c. 247, § 2991. That form of remedy reaches a person "interested in" a contract or whose rights are "affected by any statute . . . contract or franchise." *Id.*, § 2992.